VOLUME XXXIII NUMBER 4

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PARTIAL CONTENTS

(For complete Table of Contents—see Pages 1-2)

Thirty-Seventh Annual Meeting, June 12, 1948
Address by President, Honorable Louis S. Cox
Notices to Members of the Association

A Message from the President of the Massachusetts Bar Association
Richard Wait

The Legal Profession as the Ultimate Court of Appeal
Chief Justice Honorable Stanley E. Qua

Phases of the Revenue Act of 1948—*Philip J. Woodward*

Evidence—*Admissibility of Evidence Contradicting Evidence as to Immaterial or Collateral Matters*—*James M. Rosenthal*

Limited Town Meetings—*Discussion as to Ex Officio Members*
Lincoln Bryant

Federal Constitution—*Suggested Amendment Opposed by the American Bar Association. Some Reasons for Opposition*

"Twistory", Mystery, History and Four Books

Some New Statutes and Rules of Court

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Table of Contents

Page

Record of the Thirty-Seventh Meeting of the Massachusetts Bar Association
Report of President, Honorable Louis S. Cox - - - - - 3

Notices to Members of the Association - - - - - - - 11

A Message from the President of the Massachusetts Bar Association
Richard Wait - - - - - - - - - - - - - 12

The Legal Profession as the Ultimate Court of Appeal—*(From Remarks of Chief Justice Stanley E. Qua)* - - - - - - 14

Phases of the Revenue Act of 1948—*Remarks by Philip J. Woodward at Swampscott* - - - - - - - - - - - 15

Evidence—*Admissibility of Evidence Contradicting Evidence as to Immaterial or Collateral Matters by James M. Rosenthal* - 28

Limited Town Meetings—*Discussion as to Ex Officio Members by Lincoln Bryant* - - - - - - - - - - - - - 38

Some New Statutes and Rules of Court—*Limitation of Actions of Tort—St. 1948, c. 274—Apportionment of Estate Tax—St. 1948, c. 605— Revision of General Laws, Resolves, c. 94—Federal Statute as to Powers of Appointment—Removal of Cases to Federal Courts—Revised United States Code. Changes in Probate Forms, 1, as to Notice on Petition for Probate, 2, as to Divorce Libel, with Notes—New Probate Rule as to Request for Stenographer, with Notes* - - - 41

Illegitimacy—*Imposed by Statute, and a Sermon from "The New Yorker"* - - - - - - - - - - - - - - 46

Federal Constitution—*An Important Decision of the American Bar Association in Opposition to a Proposed Amendment to the Federal Constitution. Memorandum to the Members of the House of Delegates of the American Bar Association by Frank W. Grinnell, Member of the House* - - - - - - - 50

Table of Contents (Cont'd)

Page

"Twistory", Mystery, History and Four Books—*Introductory Statement—"An Estate Planner's Handbook" by Mayo A. Shattuck—"American Arbitration, its History, Functions and Achievements" by Francis Kellor—"Protecting Our Children from Criminal Careers" by John R. Ellingston—"Handbook of Massachusetts Evidence (Second Edition)" by Prof. W. Barton Leach* - - - - - - - - - - - - 77

New Jersey Rules on the Argument of Appeals and Appellate Practice - - - - - - - - - - - - - 86

Thirty-Seventh Annual Meeting of the Massachusetts Bar Association

In accordance with notice in the Massachusetts Law Quarterly for April 1948 (p. 6) the thirty-seventh annual meeting of the Massachusetts Bar Association was held at the New Ocean House, Swampscott, Massachusetts, at 2:00 p.m. Saturday, June 12, 1948 in connection with the Masachusetts Lawyers' Institute.

President Louis S. Cox presided.

The record of the thirty-sixth annual meeting which was printed and sent to all members in the Massachusetts Law Quarterly for October 1947 was presented by the secretary and upon motion made and duly seconded the record reading was waived, and the record was approved as printed.

The treasurer, Paris Fletcher, presented his report for the calendar year of 1947 as printed in the Massachusetts Law Quarterly for April 1948 and sent to all members in advance of the meeting, and it was

VOTED: That the report be accepted and placed on file.

President Cox presented his annual report as follows:

REPORT OF THE PRESIDENT

Executive Committee Meetings

The Board of Delegates met on Friday, October 3, 1947 and as provided in the by-laws selected the following members as the Executive Committee, in addition to the President, the Treasurer, the Secretary and the Asst. Secretary who serve ex officio:

Richard S. Bowers	Eleanor March Moody
James E. Farley	Frederick M. Myers
Thomas M. A. Higgins	George L. Wainwright

Richard Wait

In accordance with the usual practice the committee have met on the last Friday evening of the month at the Parker House during the winter months. Attendance has been almost 100 percent.

To my mind it would be a distinct misfortune if the committee should give up its Friday evening meetings with all that comes from sitting down together around the dinner table. The discussion of matters on the agenda of the meetings has derived

a distinct benefit from the spirit of good fellowship that has pervaded every meeting.

In response to a letter from Lawrence E. Corcoran, the State chairman of the Junior Bar Conference of the American Bar Association, stating the need of sponsorship of the Massachusetts Junior Bar group by the Massachusetts Bar Association in order to become affiliated with the American Bar Association the Executive Committee

VOTED: To recommend to the annual meeting at Swampscott that the Association sponsor the application for affiliation.

Legislative Matters

The Executive Committee has expressed the opinions of its members on the following legislative matters to committees of the legislature:

1. In opposition to the proposal for community property. This issue is now disposed of by the passage of the new Federal tax law.
2. Of a majority of the members of the committee in opposition to H. 1597 relative to subversive activities.
3. In favor of the bill recommended by the Judicial Council in its 23rd report (p. 41) as to disqualification of judges. The bill was reported by the Judiciary Committee but did not pass.
4. In favor of a bill for summary judgment procedure to amend s. 59 of chap. 231 of the General Laws. The bill has been referred to the Judicial Council.
5. House. . .No. 1459 called to the attention of the Executive Committee by Rep. Vaughan which proposed to amend s. 25D of chap. 152 of the General Laws so as to read as follows:

   "Section 25D. No person, firm or corporation, other than an attorney or an insurer, shall solicit or carry on the business of settling, investigating or adjusting claims which arise under this chapter, unless he is a citizen of the United States or a corporation organized under the laws of this Commonwealth, and shall have obtained from the department a license authorizing him to appear in matters or

proceedings before the department. Such license shall be issued in accordance with rules established by the department. The department may provide by rule for the issuance of such licenses to persons, firms or corporations upon such proof of fitness as it may deem necessary. Each person shall be licensed annually and shall pay a license fee in an amount of $25. The department shall maintain a registry or list of all such persons licensed and said list shall be open to public inspection. Any such license may be revoked by the department, for cause, after a hearing before the department."

A majority of the members of the committee expressed their opinion in opposition to the bill. Rep. Vaughan succeeded in defeating the bill in the House.

Membership

During the past year, 501 new members have been secured for the Massachusetts Bar Association of which 376 were senior members and 121 junior members. Our membership now stands at 2,573 (the highest in the history of the Association) as compared with 2,211 members on June 1, 1947. We must continue to secure new members.

Great credit is due the Membership Committee of which Richard S. Bowers is chairman, for this splendid showing.

The booklet containing a complete list of officers, committees, members and the by-laws now in the hands of the printer will be mailed to all members of the Association during the month.

The Massachusetts Lawyer's Postwar Institute

We are very happy to announce that all underwriters of this worthy project were reimbursed in full on October 15, 1947.

Massachusetts Law Quarterly

In accordance with the vote at the last annual meeting that the committee established in 1946 to assist the editor of the "Quarterly" be continued indefinitely, I appointed Richard Bancroft as chairman to replace Lowell S. Nicholson who requested to be relieved because of his new duties at Northeastern University Law School.

The question of advertising in the publication has been under consideration by this committee. The chairman reports, "In view

of the very considerable expense of issuing the Quarterly, the committee believes that advertising space should be sold, but that advertisements should be limited to the back cover and pages and should not be inserted in the body of the text." I recommend action on this report.

It must not be assumed that this suggestion is the only result of the year's work of the committee. On the contrary, it has rendered valuable assistance to the editor, and I recommend its continuance in office.

Grievance Committee

One of the first tasks upon assuming my duties as president was to appoint a chairman of this important committee. Mr. Harold Horvitz was appointed as chairman, and, after he had devoted much time and care to assisting me in the selection of a representative committee from different parts of the Commonwealth, the present committee was appointed.

There were 44 formal complaints filed with the Committee during the past year; 27 were referred to other bar associations, principally the Boston Bar Association and the Middlesex Bar Association; 8 complaints were considered and dismissed without extensive investigation as the preliminary investigation showed that the complaint did not warrant further action; 4 cases were investigated at length and dismissed, either on the ground that no unethical conduct was involved or because there was restitution or satisfactory adjustment made and no further disciplinary action was considered necessary; 5 complaints are now pending and under investigation.

There were several other informal inquiries that did not result in the filing of formal complaints.

Miss DiPersio, secretary of the Grievance Committee, deserves special commendation for the aptness with which she has screened the complaints and has either dealt with them directly or passed them along, as the circumstances might require.

Committee on Appellate Procedure

At the January meeting of the Executive Committee it was voted that the president appoint a committee of five to cooperate with the committee of the Boston Bar Association in the consideration of draft rules and of the general subject of appellate procedure.

Soon after the committee was appointed they were contacted by a similar committee of the Boston Bar Association and have been working in conjunction with that committee on some proposed new rules with respect to preparation of records for the full bench on appeal, exceptions, etc. Final suggestions on these matters have not yet been formulated.

We believe that there is a field for the continuance of this committee for the purpose of considering various suggestions which have been made as to other possible improvements in our present appellate procedure.

Committee on Administrative Law

This committee continued its study of procedures before various administrative agencies of Massachusetts. The study has not been completed and the Committee is not ready to submit any specific recommendations.

Attention is directed to the announcement made by the Section of Administrative Law of the American Bar Association respecting an essay writing contest on the subject of State Administrative Law. The Section will give a prize of $1,000 to the writer whose essay is adjudged to be the best. Notice of the contest appeared in recent issues of the American Bar Association Journal and the April issue of the Massachusetts Law Quarterly. It is hoped that there will be some entrants from Massachusetts.

Finis

With sincere regret we note the passing during the year of a former President of the Association, Joseph Wiggin, Esquire. He lived a long and extremely useful life, exemplifying in every respect the high ideals of his New Hampshire family of Wiggins which goes back to the very beginnings of the Colony.

I undertook the Presidency of your Association with the definite expectation of serving for a short time only. The Association, under my able predecessors, had developed into a virile organization and, without doubt, it was the thought of some of those who were and are vitally interested in its welfare, that a year spent in consolidating the gains would be advisable. Perhaps, too, it was thought that the conferring of the Presidency on me would be a source of personal satisfaction to me.

It has been a great source. I can think of nothing more pleasing than to have been asked to become the president of this great

organization of Massachusetts lawyers after having served so many years, apart, in the larger sense, from them.

I trust that my service has served its purpose. It is time for the Association to look again for its head to some active, practicing member of the profession. Such a member has been found and wisely chosen, and it is with a great sense of satisfaction to me, and I know to you, that Richard Wait, Esquire, has agreed to assume the Presidency of the Association.

Finally my thanks go to the officers and members of the Executive Committee and also to all members of the other committees, not overlooking the efficient services of Mrs. MacLeod. At no time has there been anything but loyal support and service on the part of everyone.

Respectfully submitted,

Louis S. Cox,
President

The Nominating Committee submitted its report as printed in the Massachusetts Law Quarterly for April 1948 (pp. 6-7). A ballot being taken, the officers thus nominated in the report were duly elected for the ensuing year as follows:

President:	Richard Wait, Harvard
Vice-Presidents:	Richard S. Bowers, Brookline
	Reuben Hall, Newton
	Daniel W. Lincoln, Worcester
	Eleanor March Moody, Melrose
	John T. Noonan, Brookline
	William A. O'Hearn, No. Adams
	Samuel P. Sears, Newton
Treasurer:	Paris Fletcher, Worcester
Secretary:	Frank W. Grinnell, Boston
Asst. Secretary:	William B. Sleigh, Jr., Marblehead

Members at Large — Board of Delegates:

Fletcher Clark, Jr., Middleboro	Harold Horvitz, Newton
James E. Farley, Salem	Maurice J. Levy, Greenfield
Donald T. Field, Brookline	Laurence M. Lombard, Needham

Frederic S. O'Brien, Lawrence

Reuben Hall, Esq. suggested that meetings be held during the year, perhaps in different parts of the state, for the discussion of legal problems, and it was

VOTED: That the suggestion be referred to the members of the Executive Committee for further consideration.

James M. Rosenthal, Esq. suggested that the Executive Committee get in touch with Prof. Mulder of the American Law Institute, who is in charge of the project of that Institute connected with post-graduate legal education, in connection with Mr. Hall's suggestion of meetings during the year, and it was

VOTED: That this matter also be referred to the Executive Committee.

The Secretary reported that the Executive Committee had voted to recommend that the Massachusetts Bar Association approve the application of the Massachusetts Junior Bar Conference for affiliation with the American Bar Association. Upon motion duly made and seconded it was

VOTED: To approve the application.

The matter of advertising in the Massachusetts Law Quarterly as recommended by the Executive Committee was discussed and upon motion made by Mr. Black it was

VOTED: That the editor and Editorial Board be authorized to accept advertisements in the Massachusetts Law Quarterly.

It was suggested that the Annual Meeting of the Massachusetts Bar Association be held during the Saturday morning session of the 1949 Massachusetts Lawyers' Institute, and upon motion made by Mr. Bowers it was thereupon

VOTED: That this suggestion be referred to the Executive Committee for consideration.

Mr. George K. Black proposed the following resolution:

RESOLVED: That the President appoint a committee to consider the advisability of recommending to the legislature the enlargement of the scope of pretrial discovery by the oral examination of

parties and the enlargement of the scope of depositions as to all other witnesses.

After reading the resolution Mr. Black continued,

> "This is the same essential recommendation as was made by the Judicial Council* a number of years ago and was not favorably acted upon by the legislature. It merely enlarges pre-trial discovery by oral examination of parties and depositions as to all other witnesses."

Following discussion the resolution was adopted, and after further discussion Mr. Proctor made the following motion:

MOTION: That the report, findings and recommendations of the committee be referred to the Executive Committee, and that the Executive Committee be authorized to file a bill in the legislature.

The motion was carried.

Following brief remarks by President Cox, the meeting then adjourned.

FRANK W. GRINNELL, *Secretary*

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* The recommendation referred to was made by the Judicature Commission in its second and final report in 1921 (pp. 108-110, 151-152). The recommendation was limited to the oral examination of parties. As to the deposition of witnesses, the Commission said:

> "While we believe an extension of the right to take the depositions of witnesses along the line of the New Hampshire statutes above quoted will also be advisable, we think it wiser to try the experiment with the examination of parties first instead of causing confusion by suddenly expanding the machinery in two such important directions at once." See 21 M.L.Q. No. 2, Jan. 1921

Meeting of the Board of Delegates

At a meeting of the Board of Delegates of the Massachusetts Bar Association held on September 24, 1948 the following persons were chosen to serve on the Executive Committee for one year:

James E. Farley, Salem
Reuben Hall, Newton
Thomas M. A. Higgins, Lowell
Frederic S. O'Brien, Lawrence
Harold Horvitz, Newton
Eleanor March Moody, Melrose
Frederick M. Myers, Pittsfield

1949 Massachusetts Lawyers' Institute

In response to requests from many of our members the Board of Delegates at its meeting on September 24th requested the Executive Committee to plan the 1949 Massachusetts Lawyers' Institute in a new location.

A Correction and a Request

In the booklet of June 1, 1948, sent to all members of the Massachusetts Bar Association, containing a list of Officers, Board of Delegates, Committees, Members and By-laws, by inadvertence, the Franklin County Bar Association was omitted from the list on pages 4 and 6 of affiliated associations whose presidents are ex officio members of the Board of Delegates.

Please correct your copy by adding the Franklin County Association to the list on these two pages.

The secretary has extended our apologies to Judge Hayes, the President of the Franklin Association, for the accidental omission.

FRANK W. GRINNELL, *Secretary*

The substance of the address (at the Swampscott Institute) by The Honorable Charles E. Wyzanski, Jr. on Congressional Committees of Inquiry was printed in the record of the Bar Association of the City of New York last March (p. 93) and will also appear in the November issue of Fortune magazine.

A Message from the President of the Massachusetts Bar Association

Richard Wait

To the Members of the Massachusetts Bar Association:

Last June you did me the very great honour of electing me president of the Association. I am, consequently, very happy to take advantage of the amiable custom which inflicts upon the membership a "message" in the Quarterly from an incoming president to thank you for that honour and to assure you that I shall do my best to promote the interests of the Association. Those interests are necessarily the interests of each of you and of every member of the Bar whether he belongs to the Association or not. I shall do my best.

But, obviously, I cannot stop with thanks and pious protestations of unspecified benevolence. You are entitled to more. Unhappily, I have no definite program for specific action or reform to lay before you. There is plenty to be done, but we are not at the moment faced with any situation at the Bar which calls for immediate and radical action,—and, as you all know, I never was very good at "reform" anyway. I am most fortunate in coming into office at a time when the health of the Association is better than it has ever been in recent years. My task, as I see it, is to conserve our gains and to endeavour to make the Association still more serviceable to the membership. To do that I must know what you want, and you must tell me and the other officers. I make no promise to follow or to espouse any suggestion, but I do promise sympathetic consideration of all that are made.

In considering how best the Association can advance our common interests we must constantly bear in mind that it is a statewide association. As such its concern cannot be parochial. The local problems belong to the county and city associations and must be left to them. They are amply able to cope with them. But there are frequent occasions when it is difficult to tell whether a problem is local or general, since the immediate application is usually local. If any local association finds that any of its problems turn out not to be local I hope it will bring those problems to us. This Association stands ready to take over whenever the occasion arises.

In other words, as I see it, in most things the initiative should come from the local associations. I invite them to let us know their problems, and I assure them of our assistance upon all proper occasions. I earnestly ask them, through their delegates to this Association or otherwise, to keep us informed of their problems and activities.

Finally, I put forward one matter for consideration and possible discussion. A majority of our governing body (the Board of Delegates) consists of the presidents of the local associations or their delegates, yet there is no provision for common membership in both county and state associations. Probably most of our members are likewise members of the county associations but the overlapping is accidental. I invite consideration of the desirability of having membership in any one of the county associations which provide us with our governors carry with it membership in this Association. Would any such plan be to our mutual advantage?

The Legal Profession as the Ultimate Court of Appeal

(Extract from Remarks of Chief Justice Qua at the Massachusetts Lawyers' Institute, June 12, 1948)

The Supreme Judicial Court, like every court of last resort from which there is no appeal, is under a great public responsibility of which the court is very conscious. There is, however, the ultimate test of professional opinion which is faced by every American court.

Our court of appeals is the legal profession. Our corrective influence comes from you, comes from the practising lawyers of the commonwealth, comes from the professors of law, comes from the writings in the law reviews in general and from actions of other courts, in passing upon what we have done upon similar situations. Therefore, in order that we may have that corrective influence and have something to take the place of an appeal, it is necessary that we should first write opinions, so that the profession can read that which we have done—and, on behalf of the court, I ask you to read the decisions critically—but to read them before criticizing. I will be very much pleased indeed if, at any time, any member of the bar, or other person who knows something of the subject, is interested in a case—I don't mean interested personally—I mean interested in a subject, he will write any criticism that he has of a decision, or a line of decisions, provided, of course, it is thoughtful and intelligent criticism; and I know that the court will be helped by it.

So I say that the court is always dependent upon professional opinion for corrective criticism, and it is my earnest hope that that influence will be brought to bear, and that each member of the bar will feel the responsibility that rests upon him as a member of the profession—and this goes for other judges as well—if he sees a mistake, to call our attention to it. Anything of that kind that you can do will help us out in the performance of our duties, relieve us to some extent from the weight of responsibility and will be thoroughly appreciated. I value the opportunity of being here to say that to you tonight.

Phases of the Revenue Act of 1948

(Remarks of Philip J. Woodward as recorded at Swampscott)

The Revenue Act of 1948 and particularly the new marital deduction which has been introduced into the estate tax presents the most important change in federal taxation which has occurred in the last twenty years. Unfortunately for us lawyers the change is no less confusing than it is important. My purpose is to try to reduce that confusion by explaining the general nature of the changes and the reason why they were adopted. The more complicated problems I will leave to be raised by those of you who choose to do so at the end of my discussion by asking questions which I will try to answer.

I realize it can be a little bit embarrassing inviting you to ask questions. In the first place, I know there will be any number of questions that I can't answer. I don't feel too badly about that because I know there are any number of questions that *no one* can answer, including the Commissioner of Internal Revenue. You may have noticed that a few weeks ago Deputy Commissioner Bliss who had been asked to make various rulings, particularly on the insurance aspects of the new Act, made a ruling regarding the handling of life insurance under the typical income option arrangement where the wife has income for life and right of withdrawal of principal. In answer to this question the Commissioner assured the questioner that such an insurance contract did meet the requirements of the "marital deduction", a new tax phrase which I will discuss more fully later. Within a few hours thereafter apparently he changed his mind and promptly withdrew the ruling. There are any number of other questions which he just has declined to answer up to this point so I'll feel not at all embarrassed at not being able to answer your questions.

A few years ago, though, I discovered that there can be other embarrassing factors arising out of inviting people to ask questions. At that time Mayo Shattuck and I were lecturing down at Rutgers to a group of bankers. We were dealing particularly with Federal Taxes as they applied to fiduciary problems and the two of us had been working together on it and using a rather philosophical approach in which we were tracing some of the great

cases, such as Douglas, Wilcott, Helvering and Hallock and the Clifford case, and trying to draw inferences from those trends. By and large we felt that the group had been interested and that they had been following us rather well. Before the last lecture we invited anyone who wanted to ask questions to submit them in writing. There were a surprising number of questions, and most of them were quite good; but there was one of them that I won't forget. That one came from a rather confused banker who said, "will you *please* tell me in a few simple words what you have been talking about for the last week?" Well, unfortunately, I can't tell you in a few simple words what the new Revenue Act means. It just plain isn't simple and there's no way in which I can make it simple. It's going to be complicated in spots but that's the nature of the beast.

Before going into the Act itself I'd like to make some comments on the background of the Act—as to why it happened to be passed. First I perhaps should say that I am talking about the Act which was passed in April of this year; I'm not talking about the new Revenue Bill which is presently in Congress and which presumably will not be passed this year. There are a great many important things in this new Bill, but no one knows what will and what will not go through or when it will go through, so I will ignore this Bill except as it has a bearing on certain special things which I'm going to mention. But coming to the new Act which was passed, I suppose you could call it the Community Property Tax Act because certainly community property explains most of the provisions in that act. Anyone speaking on taxes here a year ago might very well have spent most of his time discussing the proposal that Massachusetts adopt outright a community property system. Now there was only one reason that I have ever heard why people in Massachusetts wanted to adopt that system and that was because there were so many Federal tax advantages that went with community property. Many felt the advantages were just too good to miss. Several other states joined the community property ranks at about that time for this reason. In fact, it is rather interesting to note that at least half of the states which have community property laws adopted them in their present form specifically in order to get Federal tax benefits. That was the admitted reason why they did it when it was presented to their legislature. Also, it is of interest to note that one of those community property

states has already repealed its statute and that there are three others that have repeal under consideration.

So obviously *community property* is the key to the background of this particular tax act. For several years the Treasury Department tried to meet the discrepancy that there was between people who lived in community property states and people who lived in common law states such as Massachusetts by passing legislation which would, for tax purposes at least, place community property people on the same basis that we were. For example, there was an attempt to tax income on the basis of what person's efforts generated the income or what person's original property generated the income. Well, the attempt to pass such legislation has always proved unsuccessful. The Treasury Department did in 1942 get Congress to pass some legislation which, for estate and gift tax purposes, placed community property states on substantially the same basis that we were, but it was the income tax that hurt most, and this national trend to adopt community property rules in order to get tax benefits practically forced Congress to do something. Well, they did it finally. Congress originally approached it almost wholly from the income tax standpoint. You may remember that during last fall and early winter all you heard about was splitting the income and the advantages that might come to us from such splitting. And then, rather as a surprise to most of us, including myself, as February came along it sounded as though Congress might try to do something about estate and gift taxes, but nothing very specific was said about the nature of the proposed changes. It is of interest to notice that as the Revenue Bill of 1948 was introduced in the house it dealt with nothing except the income tax aspect; there was no provision for changing the estate tax or the gift tax. Later, on the floor of the house, the bill was amended to include estate tax and gift tax provisions in extremely crude and rudimentary form, and it wasn't until the Act got to the Senate that a careful revision was made of that aspect of the proposed bill. Well, the Senate, considering the short time which it had the Bill, did an amazingly good job in making it somewhere nearly intelligible, but I must emphasize the "somewhere nearly", because the Act certainly is not intelligible in spots. Considering the way in which it came up, considering the revolutionary aspects of this type of legislation, there is nothing in the

least surprising that neither I nor the Commissioner, nor Deputy Commissioner Bliss know what the act means in many instances.

We do know, however, that it was the intention of Congress to place people who live in common law states such as Massachusetts on the same basis as people who live in community property states such as California. Thus, although our property laws have been in no way changed, the measure of our tax liability is placed on substantially the same basis as though we lived in a community property state. Now that calls for some rather delicate tight-rope walking when it comes to phrasing the problem and working out machinery to carry out this new concept. It doesn't prove too difficult when you come to the income tax. For years and years we have been familiar with joint returns for husbands and wives. In the past, we have merely combined the income of both parties, combined the deductions, combined the exemptions and computed a tax at regular rates on what was left over. Under the new law we use this same joint return except that after we have subtracted the combined deductions and exemptions from the combined income of husband and wife, the remaining balance is divided in two, and the income tax on each one-half is computed separately. Now, let's suppose, for example, that the net taxable amount has turned out to be $20,000. The $20,000 is divided in two; the tax is computed on $10,000 and then multiplied by two to get the total tax liability of husband and wife.

All of you are familiar with the fact that the top surtax rate on $10,000 of taxable income is substantially less than it is on $20,000 of taxable income. And on those particular figures the husband and wife who file a return on that split income basis would pay a tax in 1948—just because of the splitting of the income features—of approximately 25% less than they would have paid in 1947 on the identical income. But that wasn't all that Congress gave us in the way of income tax relief. It also increased personal exemptions from $500 each to $600; it gave persons over the age of 65 an additional personal exemption of $600 and there was percentage decrease in rates. These additional factors would save that particular husband and wife another 5% or so, so that on the $20,000 income that I was talking about, that husband and wife will pay about 30% less tax in 1948 than they would have paid under identical circumstances in 1947, so it's a rather substantial saving. A great many of you have had to re-

compute estimates for June 15 and have discovered for yourselves that the mechanics are rather simple. Hence, I don't think that it will be very helpful to go into any of the refinements of the income tax amendments. They are not very difficult except when you come to situations where a husband and wife happen to have different fiscal years and you try to fit those in together. There are a few special situations where the new rules can be troublesome but by and large they are not difficult and it will be easy enough by just referring to one of the little tax booklets to deal with most of the income tax problems as they arise.

The much more significant part of the Revenue Act from our standpoint, as lawyers who deal with technical problems, is that afterthought that was tagged on—that afterthought in revising the gift tax and the estate tax. Well, you may wonder why those happened to be included. Why did Congress decide to rush those through at the last minute and why was it done with so little preparation? I think it comes down to practical politics—it was fairly certain that Truman would veto the new bill, as he did. It was essential if that veto was to be overridden to have the votes of most of the Congressmen from the community property states. But why should these states give up such a good thing as they had in their income tax advantages unless they got some benefit out of the new Act? They clamored for a repeal of the 1942 amendment which had attempted to tax community property for estate and gift tax purposes much as though community property did not exist. In fact, the 1942 amendment had been slightly unfair to the community property states and they were complaining about it quite bitterly. This offered the perfect chance to obtain their support by repealing the 1942 amendment and by adopting the community property concept of tax for all parts of the country for the purpose of the gift and estate tax as well as the income tax. Accordingly Congress did repeal the 1942 provisions and they worked out a structure which provides in substance that for the purpose of the gift tax and the estate tax we will consider that each spouse has an undivided one-half interest in all of the property of the other spouse. Therefore, if a husband wants to give away $100,000 to his wife he isn't really giving away $100,000 because she owns half of it already; he's only giving her $50,000. Therefore, for the purpose of the gift tax, it's only a gift of $50,000 and the taxes will be computed that way. Likewise, when a man

dies, his wife is already—so far as tax philosophy is concerned—an undivided owner of one-half of her husband's property. Hence, if he leaves her only one-half of his property, he's leaving her nothing more than what she had or was entitled to already, and so there is no estate tax on that one-half of the estate. That particular maneuver is known as the "marital deduction".

The rest of my discussion is going to deal primarily with the gift tax and the estate tax. In so doing, I am going to avoid using the term "spouse"—it happens to be a word I don't like. Instead, and in the interest of simplicity, I will talk about husbands alone, as though the husband were the moving party in gifts and the husband were the one who is making a will. It's exactly the same thing if the wife is doing it, but it's too complicated to keep saying husband and wife all the time and I refuse to use the term "spouse."

First, I will briefly discuss the gift tax. As I have said already, if a husband chooses to make a transfer to his wife, for the purposes of computing the gift tax only one-half of that transfer need be reported. That obviously cuts down very substantially the tax on transfers between husbands and wives. But there's a second aspect of the gift tax amendment which to most of us I think is much more important and which applies whenever a husband chooses to make a gift to his son or to any person other than his wife. For the purpose of making that gift he is entitled, at least with the consent of his wife, to treat half of what he is giving as though it came from his wife and to use her exemption as well as his own in determining the amount of the taxable gift. Let's translate that into dollars and cents as being the easier way to follow what I'm trying to say. Suppose this husband wants to give $50,000 to his son, that his wife has no occasion to make large gifts on her own account, and that she wants to cooperate in keeping the tax burden down as low as possible. This husband has the right to treat the $50,000 transfer as being a gift of $25,000 from him and a gift of $25,000 from his wife. They each have a $3,000 annual exemption which they are entitled to use against their $25,000 gift and if they haven't already used up their $30,000 general exemption (their lifetime exemption, if you want to call it that) each one of them is entitled to use his or her general exemption also. So we find that, if that husband and wife have not already used parts of their general exemption,

between the two of them they could have given up to $66,000 to this particular son without having any taxable gift. They would each apply their individual $3,000 exemption and they would each apply so much as they needed to of their lifetime $30,000 exemption. That obviously makes it possible for anyone to dispose of a great deal of his property to various members of his family without having any substantial gift tax burden to worry about.

It also means that you presumably won't even have to report annual gifts of not more than $6,000 to your wife. The community property fiction cuts your gift to her in half and your annual $3,000 exemption covers the balance. But much of the incentive for making transfers between husband and wife has now disappeared. First of all, there is no occasion to make transfers between husband and wife as a means of splitting the donor's income. That has been done for us automatically for income tax purposes by the new law. A similar situation exists as regards the estate tax saving. Under the estate tax, as I will describe in more detail in a moment, you can leave half of your estate to your wife without any tax on that half. On a large estate that is probably all you're going to want to have go that way. Therefore, why should you divest yourself of the property during your lifetime? Why not wait until you die and transfer it with the benefit of the marital deduction. That isn't always going to be true but by and large the incentive for making transfers between husband and wife is very much reduced, and I think that you are going to see less rather than more of such transfers.

For most of us, as lawyers, the really tricky and troublesome aspect of the new Revenue Act is to be found in the estate tax amendments. In particular, there are two new and troublesome phrases that come into our terminology as a result of the new Act. One of these is the "marital deduction" already mentioned. This is important as the measure of the estate tax saving which may be obtained under the artificial community property concept. The second new phrase is "terminable interest" which is the term for property which, even though it passes to the wife after a fashion, nevertheless is not entitled to the marital deduction because of the nature of the property interest. The most common type of property interest which is classed as a terminable interest is a mere life estate left to a wife. This is objectionable because Con-

gress naturally enough insists that if the property in question is to be exempt in the estate of the husband, it must be left in such a way that it will probably be taxed in the estate of the surviving wife. One can hardly object to this general concept so long as it is properly applied. The difficulty is that in order to accomplish this result Congress has introduced some highly complicated provisions which play merry hob with the drafting of trusts and insurance settlements.

Before discussing these complications in detail, let us look at the more simple application of the estate tax as amended. If a husband merely leaves property outright to his wife, it is perfectly clear that such an outright leaving of property, either by will, or by inheritance, or by joint tenancy, or by gift in contemplation of death, or by life insurance—any outright transfer of that sort from husband to wife which would normally be subject to the Federal estate tax—is entitled to the marital deduction to an extent not to exceed one-half of what is roughly the net estate as computed before any allowance for gifts to charity and previously taxed property. For example, suppose a man dies with a net estate of $200,000. If he leaves $100,000 outright to his wife, his estate is entitled to a marital deduction of that amount, so that cuts his taxable estate down to $100,000. He is still entitled to the $60,000 exemption which reduces the taxable part of his estate to only $40,000. On that $40,000 the tax is about $5,000 whereas if there hadn't been this marital deduction the tax would have been over $30,000, giving an immediate estate tax saving of over $25,000. But next we must look at the wife's estate on her death. We have assumed that she has received an outright bequest of $100,000. If she still has it when she dies, this property is obviously going to be taxable as a part of her estate. However, if she had little or no property of her own, we have left a taxable estate of only about $40,000 after taking her own $60,000 exemption. This subjects her estate to a tax of around $5,000 and we get a total tax in both estates of something less than $10,000. Thus the combined estate tax on both estates is $20,000 less than the tax on the husband's estate alone—a very substantial saving.

In the past, very commonly an estate of this sort would have been handled by a will containing a trust of most of the assets in the estate, giving the wife the income for life and so much of

the principal as the trustee might feel that she needed. In this way she was given the maximum trust protection during her lifetime, while on her death none of the trust assets were taxable as a part of her estate, assuming that she wasn't a trustee. This method avoided having the assets taxed in both estates and it also provided highly desirable trust management and protection which Congress recognizes as desirable. So Congress was faced with the problem of devising a formula which would not unduly discourage the use of trusts and of installment settlements and the like and yet not permit property to escape taxation in both the estate of the husband and the estate of the wife. Sound estate planning for large estates almost always involves trust arrangements and even in smaller estates the installment arrangements are often desirable. Everyone agreed that it would have been quite unhealthy to discourage this type of settlement by permitting no marital deduction if one leaves his property to his wife in that fashion.

The recognition of this principle was more of a concession than it seems at first blush. Under the traditional community property rule as they have it in the West, the community interest which passes to the wife on the death of the husband goes to her outright, and there is no way in which the husband can put strings on it. Accordingly the people in the community property states have never been able to use the trust device as a means of handling that part of the estate which automatically passed to the survivor, and there was a real danger that this thinking would be carried into the new law. But nevertheless Congress recognized that it ought not to discourage trusts in common law states and so the new Act provides that if you meet certain rather strict requirements you can leave property in trust or under insurance options and installments and still get the benefit of the marital deduction. Here are some of the things that you have to do in order to meet those requirements. First, the wife must be entitled to all of the income during her lifetime; there can't be any provision that she can have so much of it as the trustee wants to give her and there can't be any provision that she shall have only part of the income with the other part going to the children. In so far as that part of the property which is to get the benefit of the marital deduction she must have the right to all of the income. She must not only have the right to all of the income but she

must have the right to it currently. The trustees must distribute it to her not less frequently than annually. The trustees must not have any power to accumulate that income. There must be no other current beneficiaries of that trust who may receive from that trust either income or principal. It's all right for the trustee to have a power to advance principal to the wife or probably for her benefit, but it must be for her and for her alone. There can be no additional power such as we have often put in trusts in the past permitting the trustee to use principal for the benefit of the children or any other beneficiaries.

Next, the wife must have a broad power of appointments over all of the trust corpus remaining at the death of the wife. Now it's perfectly true that the trustee may have used up the whole trust by turning it over to her because she needed it; that's all right. But, if there's anything left there when she dies, she must either have the right to dispose of what's there at the time of her death by a power of appointment and dispose of it practically any way she wants to or she must have had the right to have disposed of it any way she wanted to during her lifetime. Or to put it in more lawyer-like language, she must have a power to appoint either by deed or by will either to herself or to her estate or to her creditors or to any other person. Now you will remember I have used "or"—I haven't said "and". As the Act reads, it isn't necessary that she have the right to do all of those things but she must at least have the right to appoint either to herself or to her estate. Obviously, if she can appoint to her estate she can in her own will dispose of it any way she wants to; or if she can appoint to herself during her lifetime, it means she can take the whole thing if she wants to. Accordingly, she must have the right to do anything she wants to with that property either during her lifetime or at her death, but presumably not both. The Act is ambiguous in this respect but the Senate report says very clearly that a power to appoint by will alone is adequate.

Now she must have the right to exercise this power of appointment alone and unconditionally. There can't be any provision that she can exercise it with the consent of the trustee. There can't be any provision that she can exercise it only if she doesn't remarry. There can't be any provision that she can exercise it only for the benefit of children and issue. You can't have any strings of that sort on it. If you have set up a trust which meets

all of those requirements, then the assets which go into that trust will be entitled to be used in the computation of the marital deduction for the husband's estate.

Now, let's for a moment consider the type of problem that you and I, as lawyers, have been meeting and are going to have to meet a lot more often as we review our wills and our trusts in the light of the new Revenue Act. One of the first things that we discover is that in the typical will or typical trust we have a single trust—the wife may be either the beneficiary who receives part of the income with the other part going to the children or she may be the beneficiary of all of the income but part of the principal can be distributed to others. One would suppose that the best solution was to keep a single trust while assuring the wife of at least one-half of the income and a power of appointment over at least one-half of the assets. But under the Act as it now reads that isn't enough to meet the requirements of the marital deduction. Instead you must create a separate trust which meets the requirements which I have spelled out and then you may put the balance in another trust of the conventional variety. You may say that my advice doesn't make much sense under the logic of the Act and I quite agree. But if you insist on assuming that the Act is going to be logical all the way through you are sure to get in trouble. In view of the way the Act came to be passed, we are lucky that it makes as much sense as it does. In this instance a literal reading of the Act requires that the wife's broad interests in income and principal attach to the whole trust and the only safe thing is to assume that the Act means what it says. So if you have this sort of situation, the only safe thing is to have two separate trusts, one to meet the requirements of the marital deduction and the other expressly limited so that it will not be taxed as a part of the wife's estate when she dies.

A second thing that you must watch for is a power to accumulate income; such a power will forfeit the marital deduction. Also, watch for powers that give too broad discretion over net income. The Act provides that all the net income must be distributed; who is to decide what constitutes the net income? If it is the trustee, then you should review your instruments and make sure that the trustee's powers are kept within reasonable limits in determining what is income and what principal. Also, you must be careful about giving the trustee too much discretion to determine when

the income is distributable, since the Act provides that it must not be less often than annually. So watch your trust powers—they can prove troublesome.

The next problem is the gift over in default of appointment. What can you provide in the event that your wife doesn't exercise that power of appointment which you had to give her to meet the marital deduction? Can you say where the property is to go in the event that she doesn't exercise the power? The answer to that is "Yes"; at least Deputy Commissioner Bliss has placed himself on record to that effect, and I think it is only fair to assume that his ruling will be followed.

Quite apart from tax law, one of the things that we, as lawyers, have to remember when we start dealing with powers of appointment is that people have been known to get into trouble with the rule against perpetuities, particularly when the power is exercised by the creation of a new trust. One of the reasons why those troubles are apt to arise is that under our Massachusetts rule a general residuary clause will exercise a power of appointment without specifically referring to the power. Altogether too many times either the testator or, worse still, the draftsman doesn't realize the existence of the power and hence he may make a disposition in the second will—in the will which exercises the power —which violates the rule against perpetuities and gets you into all sorts of trouble. I am hoping—I am merely hoping, I don't know the answer to this—that we will eventually find out that it is proper to restrict the power that is given to the wife so that it can be exercised only by a specific reference to that power. It seems to me that such a restriction ought to be all right, since it does not cut down her essential right of disposition but merely requires that she exercise her right in an orderly and sensible fashion. That is just another one of the things I hope we will know after the regulations come out. So far, all we have to go on is the Act itself, the Senate Committee Report, and a few rulings by Deputy Commissioner Bliss. One of these days—I hope within the next month or two—The Treasury will issue a set of regulations which should clarify a lot of doubtful matters. I hope it makes clearer the handling of the charging of estate and inheritance taxes against particular shares in the estate. In computing the amount of the marital deduction, it looks as though the deduction would be limited to the net amount passing to the wife after

deducting any death taxes, state or federal, which may be charged against her share. This calls for some delicacy in our drafting to make sure that we make that tax burden fall where we want it.

I find I'm getting near the end of my time and I want to leave most of this remaining time for questions from the floor. Before closing, I'll just make one or two final comments. I have been talking about taxes and therefore I suppose I've given the impression that taxes are the all-important element to consider when you start reviewing your wills and trusts. That's the last thing that I believe; I merely recognize that you can't do an intelligent job of reviewing a will or a trust or of reviewing any family picture without understanding how the tax burden applies to that particular situation. But the last thing that I want you to do is to spoil good estate plans in order to save a few extra tax dollars under this new act. Moreover, if you will get out your pencil and do some of the rather complicated arithmetic that is involved in computing possible tax savings, you will find that when your computations are done there are a large share of the sizable estates where it just plain isn't worthwhile making any changes because of the new Act. Our own experience has been that we are quite surprised to find how seldom it seemed advisable to make any substantial changes. On the other hand, I happen to have one situation in mind where a man has provided that a substantial part of his very large estate is to go to charity. There are no children and hence the other main beneficiary is his wife. It is a very interesting thing to note that if he leaves one-half of his estate outright to charity and the other half in trust to his wife with broad powers of appointment sufficient to qualify for the marital deduction, there will be no estate tax whatsoever on his estate even though it is worth more than a million dollars. The half that goes to his wife is exempt under the marital deduction and the other half is exempt since it goes to charity. This rather amazing result follows because the fifty percent limitation in computing the marital deduction applies before taking any deduction for gifts to charity.

That was not a typical situation and there are an amazing number of other instances where we have come to the conclusion that it just isn't worth trying to get any additional marital deduction. This is partly because the saving appears illusory once the additional tax on the wife's estate is taken into consideration and

partly because to seek the deduction would mean the upsetting of a presently sound plan. We have also been pleased to find that our clients generally have adopted this point of view.

From this I conclude that most laymen are taking a rather sensible attitude toward the problems presented by the new marital deduction. If we lawyers can be as sensible and if we can ever master the many complexities presented by the Revenue Act of 1948 we should be able to perform a real service to our clients in our drafting of wills and trusts. If we fail to deal intelligently with this new and important aspect of taxation, may Heaven, or at least Congress, help our clients.

Admissibility of Evidence Contradicting Evidence as to Immaterial or Collateral Matters

1. In 1834, in the case of *Com.* v. *Buzzell,* 16 Pick. 153, the Court held that if evidence as to a collateral point not material to the issue is admitted, whether in direct or cross-examination, that evidence offered to contradict it is inadmissible. "If a party cross-examining asks questions in relation to irrelevant facts, in order to sift the witness, he must take the answers as conclusive; he cannot afterwards call other witnesses to disprove them." (p. 157). So it is as to irrelevant matter offered without objection in direct testimony. "It seems to us that if an immaterial fact is stated by a witness of his own accord, or as introductory merely to material testimony, or if the party who calls a witness is permitted, without objection, to question him as to immaterial facts, the irrelevant testimony must be regarded in the same manner as if it had come out in cross-examination, and the other party cannot call witnesses to contradict it." (p. 158)

2. It will be noted that there is nothing in the language of the Court tending to show that the Court had a right within its discretion to admit evidence contradicting testimony on immaterial or collateral matters. The reason for the rule, so far as cross-examination is concerned was elaborated upon in a dictum in the case of *Hathaway* v. *Crocker,* 1843, 7 Met. 262, where Chief Justice Shaw said on page 266: "In cross-examination, an adverse party is usually allowed great latitude of inquiry, limited only by

the sound discretion of the court, with a view to test the memory, the purity of principle, the skill, accuracy, and judgment of the witness; the consistency of his answers with each other, and with his present testimony; his life and habits, his feelings toward the parties respectively, and the like; to enable the jury to judge of the degree of confidence, they may safely place in his testimony. The rule is, that when the question is of this description, relative to a fact collateral to the issue, and not material to it, the answer of of the witness must be taken as it is, and other evidence cannot be offered to contradict him. And the reason of this rule is obvious: The cross-examination, to the extent mentioned is allowed only for the purpose of exhibiting the witness in his true light to the jury; and when that is done, the whole purpose of cross-examination to matters out of the issue is accomplished. Besides; if a different rule were adopted, if the rule stated were not strictly adhered to, the trial of a cause would branch out into collateral issues without limit. A witness, therefore, cannot be called to contradict what another witness has thus testified to on cross-examination relative to a fact not material to the issue." The case of *Com.* v. *Buzzell* has never been, *in express terms,* limited or overruled.*

3. Indeed in a late case it has been expressly followed. In *Com.* v. *Farrell,*————Mass.————, 1948 Mass. Adv. Sh. 477, the court says on page 493: "Assignments 33 and 34 are based upon exceptions to the exclusion of testimony by two witnesses concerning an incident that occurred at Westover Field in April, 1946, when the complainant was present. There was no error. The evidence was offered by the defendant to contradict in some details the testimony of the complainant concerning the incident, which had been adduced from her on behalf of the defendant in cross-examination. The facts involved (p/494) were collateral and immaterial to the issues in the case and accordingly the defendant was bound by her testimony. *Commonwealth* v. *Buzzell,* 16 Pick. 153, 157-158. *Shurtleff* v. *Parker,* 130 Mass. 293, 297.

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* See, however, the case of *Mowry* v. *Smith,* 1864, 9 Allen 67-69, where the court said that if a party introduces without objection on direct testimony immaterial evidence, that the other party may as of right introduce evidence directly contradicting the immaterial evidence. But in that case the Court held that the contradicting party had been allowed to introduce evidence which went far beyond the limits of direct contradiction, and so held that the admission of the evidence was reversible error. See, also, *Brown* v. *Perkins,* 1861, 1 Allen 89, 96.

Alexander v. *Kaiser*, 149 Mass. 321, 322. *Commonwealth* v. *Smith*, 162 Mass. 508, 509. *Chalmers* v. *Whitmore Manuf. Co.*, 164 Mass. 532, 535. *Fisk* v. *Fisk*, 263 Mass. 34, 36-37. Wigmore on Evidence (3rd Ed) Sec. 1021."

4. A table of cases in which it is held, or said, that evidence contradicting collateral matter, or matter not material to the issue, is *not* admissible, appears in a footnote.*

5. Some forty years, however, after the case of *Com.* v. *Buzzell*, above cited, a different principle was announced in the case of *Brooks* v. *Acton*, 1845, 117 Mass. 204, where the Court said in upholding the decision of a judge of the Superior Court in excluding certain evidence; (p. 208) "The introduction of immaterial testimony to meet immaterial testimony upon the other side is within the discretionary control of the presiding judge." Two things should be noted about this statement: (1) No authority is cited for the principle: (2) As the evidence offered to contradict the immaterial testimony was excluded, and not admitted by the trial judge, the ruling of the trial judge could have been upheld under the principle laid down in *Com.* v. *Buzzell.*

6. Nevertheless, the principle laid down in *Brooks* v. *Acton* has been followed in a list of cases almost as long as that following the opposing principle of *Com.* v. *Buzzell.*

7. A table of cases in which it is held, or said, that *it is within the discretion of the court to admit or exclude evidence* contra-

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* *Com.* v. *Buzzell*, 1834, 16 Pick. 153, 157, 158; *Hathaway* v. *Crocker*, 1843, 7 Met. 262, 265-266; *Com.* v. *Hunt*, 1855, 4 Gray 421, 423; *Lane* v. *Bryant*, 1857, 9 Gray 245, 247-248; *Farnum* v. *Farnum*, 1859, 13 Gray 508, 512; *Com.* v. *Cain*, 1859, 14 Gray 7; *Fletcher* v. *Boston & Maine Railroad*, 1861, 1 Allen 9, 14; *Com.* v. *Fitzgerald*, 1861, 2 Allen 297; *Parker* v. *Dudley*, 1875, 118 Mass. 602, 604; *Kaler* v. *Builders Insurance Company*, 1876, 120 Mass. 333, 336; *Eames* v. *Whitaker*, 1877, 123 Mass. 342, 344; *Shurtleff* v. *Parker*, 1881, 130 Mass. 293, 297; *Jordan* v. *McKinney*, 1887, 144 Mass. 438; *Fitzgerald* v. *Williams*, 1889, 148 Mass. 462, 467; *Alexander* v. *Kaiser*, 1889, 149 Mass. 321; *Com.* v. *Jones*, 1892, 155 Mass. 170; *McLean* v. *Fiske Wharf and Warehouse Company*, 1893, 158 Mass. 472, 475; *Com.* v. *Smith*, 1895, 162 Mass. 508; *Carr* v. *West End Street Railway Company*, 1895, 163 Mass. 360; *Pierce* v. *Boston*, 1895, 164 Mass. 92, 98; *Chalmers* v. *Whitmore Manufacturing Company*, 1895, 164 Mass. 532, 535; *Merrigan* v. *Hall*, 1900, 175 Mass. 508; *Harvey* v. *Mudarri*, 1907, 195 Mass. 418; *Gorham* v. *Moor*, 1908, 197 Mass. 522, 525; *Casavan* v. *Sage*, 1909, 201 Mass. 547, 553-554; *Bartlett* v. *Medford*, 1925, 252 Mass. 311, 313-314; *Wilson* v. *Daniels*, 1926, 257 Mass. 234, 237, 238; *Fisk* v. *Fisk*, 1928, 263 Mass. 34, 36; *Mahan* v. *Perkins*, 1931, 274 Mass. 176, 181; *Com.* v. *Connolly*, 1941, 308 Mass. 481, 495; *Com.* v. *Farrell*, 4/12/48, — Mass. —, 1948 Mass. Adv. Sheets 477, 493-494.

dicting collateral matter or matter not material to the issue, will be found in the footnote.*

8. It is a peculiar thing that there does not appear in the two long and opposing lines of cases any suggestion or hint that there is any contradiction between them, nor is there any attempt made to differentiate or harmonize them. Perhaps the most striking instance of this lack of harmony occurs in 257 Massachusetts. In the case of *Wilson* v. *Daniels,* 257 Mass. 234, decided October 14, 1926, the Court says, on p. 238: "Immaterial matter appearing on the cross-examination of a witness cannot be contradicted." In the case of *Com.* v. *Mercier,* 257 Mass. 353, decided October 30, 1926, the Court says on page 374: "If it be assumed that the letters contradicted the witness on collateral matters, still the extent to which a witness may be contradicted on such matters is largely in the discretion of the trial court."

Under the circumstances it would be well further to examine, break-down and analyze both lines of cases in the attempt to determine just how far they are inconsistent or to what extent they may be harmonized or reconciled.

9. In the following group of cases in the footnote,* immaterial evidence was introduced in direct examination without objection and evidence contradicting the same was excluded, and the exceptions of the contradicting party to such exclusion were overruled.

9A. The only case in the table of cases set forth in the preceding paragraph in which the action of the trial judge in excluding the contradicting testimony was upheld on the ground that the admission or exclusion was within his discretion, was the case of *Brooks* v. *Acton,* 1875, 117 Mass. 204.

10. In the following case, the immaterial evidence was introduced in direct testimony over objection and exception, and evidence contradicting the same was excluded, and the exceptions

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* *Brooks* v. *Acton,* 1875, 117 Mass. 204, 208; *Treat* v. *Curtis,* 1878, 124 Mass. 348, 352; *Bennett* v. *Susser,* 1906, 191 Mass. 329, 330; *Com.* v. *Wakelin,* 1918, 230 Mass. 567, 576; *Com.* v. *Russ,* 1919, 232 Mass. 58, 80-81; *Com.* v. *Williams,* 1923, 244 Mass. 515, 521; *Com.* v. *Patalano,* 1925, 254 Mass. 69, 74; *Com.* v. *Mercier,* 1926, 257 Mass. 353, 374; *Com.* v. *Dale,* 1928, 264 Mass. 535, 537; *Moskow* v. *Burke,* 1929, 266 Mass. 286, 290-291; *Lizotte* v. *Warren,* 1939, 302 Mass. 217, 218.

* *Com.* v. *Buzzell,* 1834, 16 Pick. 153, 158; *Com.* v. *Fitzgerald,* 1861, 2 Allen 297; *Brooks* v. *Acton,* 1875, 117 Mass. 204, 208; *Parker* v. *Dudley,* 1875, 118 Mass. 602, 605; *Casavan* v. *Sage,* 1909, 201 Mass. 547, 553-554.

of the contradicting party to such exclusion were overruled. *Mahan* v. *Perkins*, 1931, 274 Mass. 176, 181-182.

11. In the following case, the immaterial evidence was introduced in direct examination without objection, and evidence contradicting the same was admitted, over exceptions, and the exceptions were overruled, on the grounds that the admission or exclusion lay within the exclusion of the trial judge. *Com.* v. *Russ*, 1919, 232 Mass. 58, 80-81.

12. In the following case, the immaterial evidence was introduced in cross-examination without objection, and evidence contradicting the same offered by the cross-examined party was excluded, and the exceptions of that party to such exclusion were overruled on the ground that the admission or exclusion of such evidence lay within the discretion of the trial judge. *Goodyear Park Co.* v. *Holyoke*, 1937, 298 Mass. 510, 511-512.

13. In the following case, the immaterial evidence was introduced in cross-examination without objection, and evidence contradicting the same offered by the cross-examined party was admitted, and the exceptions of the contradicting party were overruled, on the grounds that the admission or exclusion lay within the discretion of the trial judge. *Treat* v. *Curtis*, 1878, 124 Mass. 348, 351-352.

14. In the cases in the footnote,* the original immaterial evidence was introduced in evidence, without objection, in cross-examination, and the cross-examining party then allowed to put in evidence matter contradicting the same, whereupon the exceptions of the contradicted party were sustained.

14A. In the case of *Fitzgerald* v. *Williams*, 1889, 148 Mass. 462, the immaterial testimony had been admitted on cross-examination without objection. The cross-examining party was allowed to put in the contradicting testimony, over exception, by the trial judge, whereupon the exceptions of the contradicted party were sustained, but on other grounds: In this case the Court said: (p.467) "It is true, the plaintiff on cross examination had denied

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* *Harrington* v. *Inhabitants of Lincoln*, 1854, 2 Gray 133; *Farnum* v. *Farnum*, 1859, 13 Gray, 508, 512; *Lane* v. *Bryant*, 1857, 9 Gray, 241, 247-248; *Fletcher* v. *Boston & Maine Railroad*, 1861, 1 Allen 9, 13-14; *Kaler* v. *Builders Insurance Company*, 1876, 120 Mass. 333, 335-336; *Shurtleff* v. *Parker*, 1881, 130 Mass. 293, 295, 297; *Jordan* v. *McKinney*, 1887, 144 Mass. 438, 439; *Fitzgerald* v. *Williams*, 1889, 148 Mass. 462; *Alexander* v. *Kaiser*, 1889, 149 Mass. 321; *Carr* v. *West End Railway Company*, 1895, 163 Mass. 360.

that one of his nieces had denounced him as having accomplished her ruin, or that Kennedy had threatened to denounce him for having seduced her; but this was a collateral matter, and it was not competent to introduce the testimony merely for the purpose of contradicting that denial, nor has its competency been urged on that ground."

15. In the cases in the footnote,* the original immaterial evidence was introduced in evidence without objection in cross-examination, whereupon the cross-examining party offered in evidence testimony to contradict the same. The contradicting evidence was excluded and the exceptions of the contradicting party were overruled.

15A. The only cases in the line set forth in the preceding paragraph in which the action of the trial judge excluding the contradicting testimony was upheld on the ground that the admission or exclusion was within his discretion were the cases of *Com.* v. *Patalano*, 1925, 254 Mass. 69, 74, and, possibly, *Fisk* v. *Fisk*, 1928, 263 Mass. 34, 36.

16. In the following cases, the original evidence was introduced without objection in cross-examination, whereupon the cross-examining party offered in evidence testimony to contradict the same. The contradictory evidence was admitted, and the exceptions of the contradicted party were overruled. *Bennett* v. *Susser*, 1906, 191 Mass. 329, 330; *Com.* v. *Williams*, 1923, 244 Mass. 515, 521; *Moskow* v. *Burke*, 1929, 266 Mass. 286, 290-291; *Lizotte* v. *Warren*, 1939, 302 Mass. 217, 218.

16A. In all the cases cited in paragraph 16, the action of the trial judge in admitting the contradicting evidence was upheld on the ground that the matter lay within his discretion. Note: that in the case of *Moskow* v. *Burke*, 266 Mass. 286, on page 291, the court said: "The ordinary practice is not to admit evidence to contradict a witness on a collateral matter brought out in cross-

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* *Com.* v. *Buzzell*, 1834, 16 Pick. 153, 157; *Com.* v. *Cain*, 1859, 14 Gray 7; *Parker* v. *Dudley*, 1875, 118 Mass. 602, 604; *Eames* v. *Whitaker*, 1877, 123 Mass. 342, 344; *Com.* v. *Jones*, 1892, 155 Mass. 170; *McLean* v. *Fiske Wharf and Warehouse Company*, 1893, 158 Mass. 472, 475; *Com.* v. *Smith*, 1895, 162 Mass. 508, 509; *Pierce* v. *Boston*, 1895, 164 Mass. 92, 96, 98; *Chalmers* v. *Whitmore Manufacturing Company*, 1895, 164 Mass. 532, 535; *Merrigan* v. *Hall*, 1900, 175 Mass. 508, 509, 510; *Hamsy* v. *Mudarri*, 1907, 195 Mass. 418; *Bartlett* v. *Medford*, 1925, 252 Mass. 311, 313-314; *Com.* v. *Patalano*, 1925, 254 Mass. 69, 74; *Fisk* v. *Fisk*, 1928, 263 Mass. 34, 36; *Com.* v. *Farrell*, 1948 — Mass. —, 1948 Adv. Sh. 479-493.

examination, but this is not an absolute rule of law, and the trial judge may in the exercise of a sound discretion admit such testimony. *Commonwealth* v. *Mercier*, 257 Mass. 353, 374. The plaintiff has not shown how he could be prejudiced in his essential rights by the admission of testimony to prove a fact he already knew. Even if the evidence should have been excluded, the error must be treated as immaterial." In the case of *Lizotte* v. *Warren*, 302 Mass. 217, the court said on page 218: "Even if, as we do not decide, the letter went no further than to contradict the defendant's testimony in cross-examination on a collateral matter, its admission was within the discretion of the judge."

17. In the following group of cases there are words to the effect that to admit evidence to contradict immaterial evidence is within the discretion of the court, but the cases went off on the basis that the matter contradicted was material rather than immaterial, and so the admission of the contradictory evidence was not, in any case, erroneous. *Com.* v. *Wakelin*, 1918, 230 Mass. 567, 576; *Com.* v. *Mercier*, 1926, 257 Mass. 353, 374; *Com.* v. *Dale*, 1928, 264 Mass. 535, 537.

18. In the following cases, there are words to the effect that collateral or immaterial matter may not be contradicted, but the cases go off on the basis that the matter contradicted was material rather than immaterial to the issue. *Hathaway* v. *Crocker*, 1843, 7 Met. 262, 266 (admitted); *Com.* v. *Hunt*, 1855, 4 Gray 421-423 (excluded; exceptions sustained); *Gorham* v. *Moor*, 1908, 197 Mass. 522, 525-526 (excluded; exceptions sustained); *Wilson* v. *Daniels*, 1926, 257 Mass. 234, 238 (admitted).

19. In the case of *Com.* v. *Connolly*, 1941, 308 Mass. 481, it is said (p. 495): "But since the subject matter of that cross-examination was immaterial to the issue in the case, the defendant could not of right contradict the denial of the witness by testimony." In that case, however, the defendant was permitted to testify that the denial of the witness was untrue. Of course, no exception may be taken by the commonwealth in a criminal case.

20. On examining the above groups of cases, it is seen that regardless of the wording of the respective opinions or the dicta of the Court, that the only cases actually at variance and inconsistent with the rule of *Com.* v. *Buzzell* (par. 1) that evidence contradicting evidence on collateral or immaterial evidence is inadmissible are the cases found under paragraphs 11 and 13, and the

first two cases in paragraph 16, in which cases the contradicting evidence was held admissible as within the discretion of the trial judge. Those cases are: *Treat* v. *Curtis*, 1878, 124 Mass. 348, 351-352; *Bennett* v. *Susser*, 1906, 191 Mass. 329; *Com.* v. *Russ*, 1919, 232, Mass. 58, 80-81; *Com.* v. *Williams*, 1923, 244 Mass. 515, 521.

21. On a similar examination of the above groups of cases it will be found that regardless of the wording of the respective opinions or the dicta of the Court, that the only cases actually at variance and inconsistent with the rule of *Brooks* v. *Acton* (par. 5) that "the introduction of immaterial testimony to meet immaterial testimony upon the other side is within the discretionary control of the presiding justice," are those found under paragraph 14, in which cases the contradicting evidence having been admitted by the trial judge, the exceptions of the contradicted party to such admission were sustained.

22. On an even closer analysis, it will be seen that the only cases in which the contradicting evidence was admitted by the trial judge, and exceptions sustained to such admission, are those in which the immaterial evidence was originally introduced by means of cross-examination, and the cross-examining party then allowed by the trial judge to put in evidence contradicting the same. All these cases are found under paragraph 14. The only cases squarely in conflict with this group are *Bennett* v. *Susser*, 1906, 191 Mass. 329, and *Com.* v. *Williams*, 1923, 244 Mass. 515, 521 (par. 16) in both of which cases the immaterial evidence was originally introduced in cross-examination, and the contradicting evidence offered by the cross-examining party. The ruling of the trial judge admitting such evidence was upheld on the ground that he had a right so to admit within his discretion. It would appear that these two groups of cases cannot be reconciled.

23. The case of *Treat* v. *Curtis*, 1878, 124 Mass. 348, 351-352, (par. 13) is somewhat different. While the immaterial evidence was likewise introduced by cross-examination, and the trial judge upheld in admitting the contradicting evidence as within his discretion, in this case the contradicting evidence was offered by the cross-examined rather than by the cross-examining party.

24. The case of *Com.* v. *Russ*, 1919, 232 Mass. 58-80-81, (par. 11) had a still further element of difference. In this case, the immaterial evidence was introduced in direct examination by the contradicted party without objection, and the contradicting evi-

dence was admitted over exception, and the contradicted party's exceptions were overruled on the grounds that such admission was within the discretion of the trial judge. It is peculiar that the Court did not refer, in its opinion, to the case of *Mowry* v. *Allen*, 1864, 9 Allen, 67 (see footnote to paragraph 2) in which case the Court, by way of dictum, said that if a party introduces without objection on direct testimony immaterial evidence, that the other party may, as of right, introduce evidence directly contradicting the immaterial evidence. See also, *Brown* v. *Perkins*, 1861, 1 Allen, 89, 96.

25. Regardless, however, of how the actual decisions may be reconciled, it is not desirable that there should continue to be this apparent conflict, as between the two lines of decisions, hereinbefore set forth under, respectively, paragraphs 4 and 7. Such apparent conflict makes for doubt in the mind of the practicing lawyer as to the state of the law, and for consequent appeals to the Supreme Judicial Court in order to settle that doubt. It gives an appearance of inconsistency to, and even arbitrariness in, the decisions of the Supreme Judicial Court. The writer, therefore, would respectfully suggest, that the rule of judicial discretion as to the admission or exclusion of evidence contradicting immaterial evidence originally announced in *Brooks* v. *Acton*, 1875, 117 Mass. 204 (par. 5) be hereafter consistently upheld in all cases except where the original immaterial evidence was brought out in cross-examination, and the contradictory evidence is offered by the cross-examining party. In this single case, the rule of inadmissibility first set forth in *Com.* v. *Buzzell*, 1834, 16 Pick. 153, and more fully explained in *Hathaway* v. *Crocker*, 1843, 7 Met. 262 (par. 2) should be maintained. In other words, so far as the rule of evidence under discussion is concerned, the cases set forth under paragraph 14 should be followed, and the cases of *Bennett* v. *Susser*, 1906, 191 Mass. 329, and *Com.* v. *Williams*, 1923, 244 Mass. 515, 521 (par. 16) should be overruled.

James M. Rosenthal
100 North Street
Pittsfield, Massachusetts

August 19, 1948

EDITORIAL NOTE

Mr. Rosenthal's article *seems* to demonstrate the need of definite recognition of the discretionary practice rather than the rule of exclusion which appears so frequently to have been disregarded that there seems to be no such rule of exclusion, or more accurately "now there is and now there isn't". If Mr. Rosenthal's suggestion is to be followed in favor of recognition of the discretionary practice, how is the trial bench and bar to be informed of this for their guidance? Must they wait from six months to ten years for some case to appear raising the question for the court to decide in an opinion after litigants have been put to the expense and other results of uncertainity in the meantime because of apparently conflicting decisions about a matter of adjective law as to the conduct of a trial? Must the already voluminous statute book be added to and waited for? Setting the legislative machinery of the state to work on such a question of practice would seem like using a sledge hammer on a mosquito. With rare exceptions, like that which Lord Bowen called the "terrible absurdity" of excluding parties from the witness stand, which was abolished by statute both in England and in Massachusetts in the 50's, all rules of evidence have been developed by judicial decision. That the courts of last resort have authority to develop the detailed rules of evidence was pointed out at length in an article in 24 American Judicature Society Journal (August 1940) pp. 41-50. The question seems to arise whether the court should not by rule clear up the uncertainty of practice discussed by Mr. Rosenthal. Compare the "preface" to Prof. Leach's "Handbook" quoted elsewhere in this number.

F.W.G.

Ex Officio Members of Limited Town Meetings

Editor Massachusetts Law Quarterly

Dear Sir:

I question some of the conclusions of Mr. Alexander Lincoln in his able article in your number of April 1948. Mr. Lincoln expresses doubt of the validity of the provisions in Acts setting up limited town meetings in towns since the adoption of Article LXX of the amendments to the Massachusetts constitution, for the inclusion of members at large (selectmen, chairmen of boards et alii) as members ex officiis of the limited town meetings.

The powers of the legislature in the matter are defined in Amendments II and LXX.

Amendment II is as follows:

> "Art. II. The general court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the constitution as the general court shall deem necessary or expedient for the regulation and government thereof and to prescribe the manner of calling and holding public meetings of the inhabitants, in wards or otherwise for the election of officers under the constitution, and the manner of returning the votes given at such meetings. Provided, that no such government shall be erected or constituted in any town not containing twelve thousand inhabitants, nor unless it be with the consent, and on the application of a majority of the inhabitants of such town, present and voting thereon, pursuant to a vote at a meeting duly warned and holden for that purpose. And provided also, that all by-laws made by such municipal or city government shall be subject, at all times to be annulled by the general court."

Mr. Lincoln says "The validity of such provision (for members ex officiis) in special acts passed before the adoption of the 70th Amendment cannot be questioned but there is serious question as to their validity in Special Acts passed thereafter, since legislative authority is restricted thereby to the establishment of a form of town government providing for a town meeting limited to elected inhabitants."

In brief, his contention is that the legislature had authority under the 2nd amendment to provide for ex officiis members of a limited town meeting, but could not do so after the adoption of the 70th Amendment.

This reduces the question to the effect of the 70th Amendment on the 2nd Amendment. .

I believe that I was the instigator of the change. At the time the town of Milton, for which I was Town Counsel, had about 10,000 inhabitants. The town desired to adopt limited town government and my memory is that I filed a bill proposing a reduction of the figures in the second amendment to 8,000. I appeared before the committee having charge of the bill and discussed the matter with a number of legislators including B. Loring Young, then I believe Speaker of the House. There was some delay in the matter. I do not believe I made the final draft of the proposed amendment but I probably saw it.

It certainly would have been a surprise to myself and others interested to learn that in reducing one restriction in the 2nd amendment we had inadvertently created another.

Before the adoption of the amendment the population of the Town of Milton increased to over 12,000 so we were no longer directly interested.

The form of the 70th amendment is as follows:

"Article of Amendment

Article II of the articles of amendment to the constitution of the commonwealth is hereby amended by adding at the end thereof the following new paragraph:—

Nothing in this article shall prevent the general court from establishing in any corporate town or towns in this commonwealth containing more than six thousand inhabitants a form of town government providing for a town meeting limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town subject to such restrictions and regulations as the general court may prescribe; provided, that such establishment be with the consent, and on the application of a majority of the inhabitants of such town, present and voting thereon,

pursuant to a vote at a meeting duly warned and holden for that purpose."

This is certainly not an express amendment of the original 2nd amendment, otherwise than as specifically set out. It would have been easy to insert it as an amendment to the amendment if such had been intended. The language "Nothing in this article shall prevent" imports merely a relaxation of the restriction as to 12,000 inhabitants without the creation of an additional restriction, which of course was what was intended by the proponents. The repetition contained in the 2nd amendment, that is "with the consent and on the application of a majority, etc." indicates an intention to have the paragraph constituting the 70th amendment stand on its own feet, and not as an amendment to paragraph 1. The word "elected" is part of a general phrase intended to describe and cover in general terms the purposes of a limited town government and as such is not to be too meticulously interpreted. In other words, it is a word of description and not of grant or restriction of power. An intention to limit powers granted by the constitution should not be found except on evidence more definite and clear than anything which can be construed out of the 70th amendment.

Mr. Lincoln seems to think that the power to set up limited town government derives from the "authority conferred by the 70th amendment". The fact is that the power derives from the original 2nd amendment as modified by the 70th amendment.

It appears that from the time of the ratification of the 70th amendment twenty-two towns have applied for and received special legislation, containing in each case provisions for ex officiis members of town meetings. It should be borne in mind that "Such long continued interpretation of a constitutional provision by the legislative department of the government may be deemed to be the true construction of the Constitution."

Rugg, C.J. in *Fitzgerald* v. *Selectmen of Braintree*, 296 Mass. 362, 367.

Lincoln Bryant

Certain New Statutes

The attention of the bar is called to Chap. 274 of the acts of 1948 which will take affect on Jan. 1, 1950 and will apply "to causes of action occurring on or after said date". The act was adopted following the recommendations of the Judicial Council in its twenty-third report for the reasons therein stated on pages 39-40 (see XXXII Mass. Law Quarterly, No. 4, December 1947).

The act reads as follows:

CHAP. 274

An Act further limiting the time within which actions of replevin, and certain actions of contract and tort, may be brought.

Section 1. Chapter 260 of the General Laws is hereby amended by striking out section 2, as appearing in the Tercentenary Edition, and inserting in place thereof the following: —*Section 2.* Actions of contracts, other than those to recover for personal injuries, founded upon contracts or liabilities, express or implied, except actions limited by section one or actions upon judgments or decrees of courts of record of the United States or of this or of any other state of the United States, shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues.

Section 2. Said chapter 260 is hereby further amended by inserting after section 2, as amended, the following section:— *Section 2A.* Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within two years next after the cause of action accrues.

Section 3. This act shall take effect January first, nineteen hundred and fifty, and its provisions shall apply only to causes of action accruing on or after said date.

Approved May 3, 1948.

Apportionment of Estate Tax

Chapter 605 of the acts of 1948 which will take affect on January 1, 1949, revises the law as to the apportionment of federal estate taxes.

Revision of General Laws

Resolves chapter 94 provides for a "revision, recodification, consolidation and arrangement of the general laws by a commission of three appointed by the governor with the advice and consent of the Council." The work is to be completed in the form of a printed report of substantive changes by the first Monday of January 1950, and their final report on the first Monday of January 1951. The commissioners appointed are Henry D. Wiggin, Chairman, formerly for many years counsel to the House of Representatives, Haven Parker and Charles F. Anderson. This work is, of course, of great difficulty and importance requiring great care as well as familiarity with the statutes. Naturally the commissioners will be glad to receive suggestions from any member of the bench and bar as to matters which may need attention in such a revision which, if enacted, will constitute the general statutes of Massachusetts. Suggestions should be sent to Henry D. Wiggin, Esq., 20 Pemberton Sq., Boston 8, Mass.

Powers of Appointment

From The Boston Bar Bulletin, Sept. 1948 by Harold T. Davis

During the last few years, various committees of lawyers, including the Committee of Bar Association Representatives, of which the writer is the representative of the Boston Bar Association, have conferred with Treasury and Congressional officials in an effort to draft a satisfactory amendment to, or substitute for, the provisions of the Revenue Act of 1942 dealing with the taxation of powers of appointment.

Those efforts were reflected in House Bill 3533, which was introduced late in the Spring of 1947 by Chairman Knutson of the House Ways and Means Committee. Although that Bill, had it been enacted, would have provided substantial relief from many of the more onerous and seemingly unjust provisions of the 1942 Act, it was considered by many of us to be too complex, both in form and in content, to be readily understandable except by the comparatively few lawyers who have followed the course of this legislation from its inception and subjected the matter to intensive study.

As a result of numerous complaints which were voiced immediately after the introduction of House Bill 3533 (including both objections to the complexity of the Bill and likewise urgings

of some counsel against its substance, on the ground that it failed to grant adequate relief), a further extension of the tax-free relief period was granted.

No further satisfactory progress having been made in the matter since that time, Chairman Knutson this spring introduced House Joint Resolution 395, which was passed and became law by the President's signature on Saturday, June 12, 1948. This resolution again extends for one year, to June 30, 1949, the period for the tax-free release to taxable powers of appointments. It is hoped by those of us who have been working on the subject that a satisfactory solution of the problem can be drafted and enacted within this further extension period.

Meanwhile, attention is called to the inclusion in the new Act of an additional provision which did not appear in prior extensions, that is, Section 2 which reads as follows:

> "SEC. 2. For the purposes of sections 403 and 452 of the Revenue Act of 1942, a power to appoint created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise, after October 21, 1942."

This section should be of great benefit to the substantial number of holders of taxable powers under wills of decendents who died after October 21, 1942 without having republished their wills. The holders of those powers now for the first time are given the benefit of a period (to June 30, 1949) in which they may release those powers without adverse tax results.

Removal of Cases to Federal Courts

A Warning

We suggest to those who have to do with the procedure for removal, that they will do well to read carefully the *present* phraseology of the removal statutes in the Revised United States Code which has been enacted by Congress.

Changes in Probate Forms

The Supreme Judicial Court has announced two changes in the Probate Forms, to be effective as soon as the forms can be prepared and at the latest by September first.

The first change provides that in the probate of wills and granting of administration c.t.a. notice shall be given to *all known*

heirs and all known legatees and devisees. This clarifies the present forms, which merely provide for notice to all known persons interested and should make uniform the practice in all counties.

The other change affects libels for divorce by eliminating the allegation that the libellant has been faithful to marriage vows and obligations.

Note

The change as to notice on petitions for probate followed a recommendation of the Judicial Council in the 22nd report for 1947 (32 M.L.Q.2 March 1947, pp. 22-28) and the 23rd report for 1948 (32 M.L.Q. 2 No. 4 Dec. 1947, p. 14). It is to be noted that the form of the petition has not been changed, so the law as to "parties" as of right, and the jurisdiction of the courts of this proceeding in rem is not affected. (See discussion in the 22nd report of the Judicial Council referred to above).

The change in the form of divorce libel is to adjust the form to the opinion of the Supreme Judicial Court. Unfaithfulness is an affirmative defense to be pleaded as appears in the 23rd report of the Judicial Council (32 M.L.Q. No. 4 December 1947, pp. 43-46). This is true also of proceedings for divorce in the Superior Court.

A New Probate Rule

As pointed out in one of Mr. Getchell's convenient and helpful leaflets (July 1948).

By St. 1947, c. 365, the former requirement in c. 214, sec. 24, that the request for appointment of the commissioner must be made "before any evidence is offered" was struck out. (See leaflet issued by us in June, 1947, copy of which will be sent on request.) This amendment prevented loss of the right to carry up the evidence on appeal through failure to make formal request for appointment of a commissioner *before* any evidence was offered.

A new difficulty arose in the Probate Courts. Although in equity cases in the Superior Court a stenographer is always present, in some of the Probate Courts testimony is not taken down as matter of routine because a stenographer may not be in court unless previously requested. Consequently a new amendment to the Probate Rules has been made (and approved by the Supreme Judicial Court) as follows:

"Requests for the appointment of a stenographer to take testimony under the provisions of G.L. (Ter. Ed.) c. 215, sec. 18, shall be made at least forty-eight hours before the case is reached for trial."

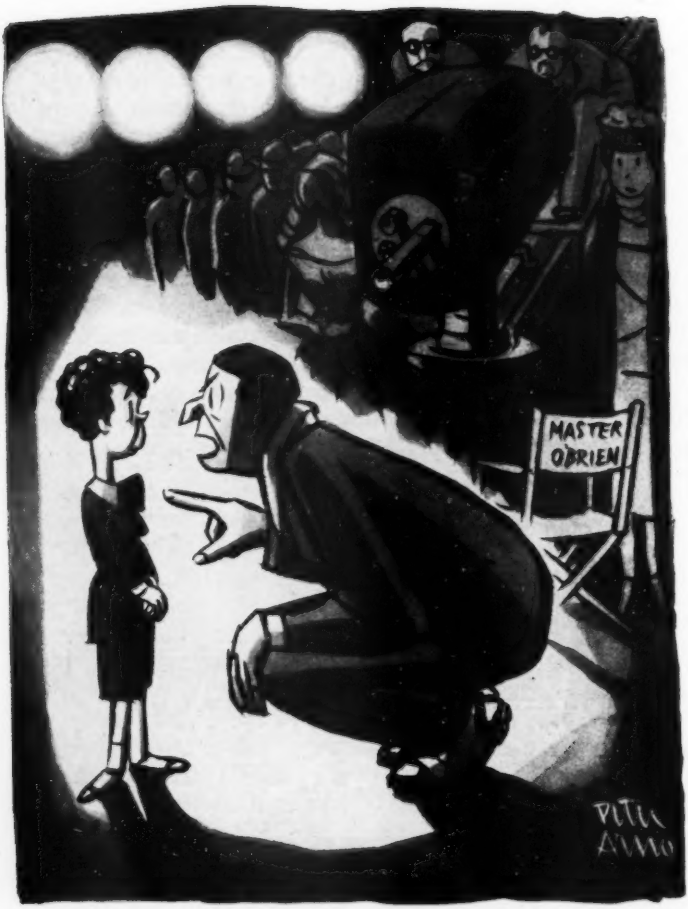
This amendment will become effective September 1, 1948.

There is no provision in the rule that the request shall be in writing, and some of the registers think that an oral request is sufficient. In Suffolk, however (and perhaps in other counties), the court requires that such notices shall be in writing. Doubtless a written request is advisable (*Brodrick* v. *O'Connor*, 271 Mass. 240, 242).

The order to commissioner (or a statement by the register that the commissioner was appointed) should be printed in the record (*Abeloff* v. *Peacard*, 272 Mass. 56, 59; *Gearin* v. *Walsh*, 299 Mass. 145, 146; note to Superior Court Rule 76 (1932), p. 222).

For other cases prior to 1947, see *Bowles* v. *Comstock*, 286 Mass. 159, 162; *Comstock* v. *Bowles*, 295 Mass. 250, 261, Note to Superior Court Rule 76, pp. 221-222; *Mayberry* v. *Carberry*, 204 Mass. 378, 381-2.

F.W.G.



"You're unhappy, see? You're an unwanted child. You were born out of wedlock."

Illegitimacy Imposed by Statute, and a Sermon from "The New Yorker"

"And they brought young children to him, that he should touch them: and his disciples rebuked those that brought them.

"But when Jesus saw it, he was much displeased and said unto them, Suffer the little children to come unto me and forbid them not: for of such is the kingdom of God. Verily I say unto you, Whosoever shall not receive the kingdom of God as a little child, he shall not enter therein. And he took them up in his arms, put his hands upon them and blessed them." (St. Mark, 10, 13-16. Compare St. Matthew 19, 12-15, St. Luke 18, 15-17).

"Then there arose a reasoning among them, which of them should be greatest. And Jesus perceiving the thought of their heart, took a child and set him by him. And said unto them, Whosoever shall receive this child in my name receiveth me, and whosoever shall receive me receiveth him that sent me: for he that is least among you all, the same shall be great." (St. Luke 9, 46-48).

Turning now to Shakespeare, Hamlet says to his mother, "Look here upon this picture and on this"! Let us look, therefore, at the cartoon on the opposite page. Unless one looks for sermons wherever they may be, one does not ordinarily look for sermons in "The New Yorker", but Mr. Arno's cartoon, with the crouching figure, representing the public, pointing the finger of scorn at the child, seems a sermon more powerful than is heard from many pulpits. And what of the law?

In the leading case of *Com.* v. *Lane*, 113 Mass. 438, Chief Justice Gray, in a learned opinion on the validity in Massachusetts of a New Hampshire marriage (in connection with an indictment for polygamy) discussed an English case in the House of Lords and then commented as follows:

"The judgment proceeds upon the ground that an act of Parliament is not merely an ordinance of man, but a conclusive declaration of the law of God; and the result is that the law of God, as declared by act of Parliament and expounded by the House of Lords, varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure.

"The case recalls the saying of Lord Holt, in *London* v. *Wood*, 12 Mod. 669, 687, 688, that 'an act of Parliament can do no wrong, though it may do several things that look pretty odd:'. . . ."

The contrast between the Gospels and the picture from "The New Yorker" suggests the question to what extent are parts of our laws, in so far as they impose illegitimacy on children, "declarations of the law of God" or something else?

The results in Massachusetts on children of remarriage after "migratory" divorces, incident to what Prof. Thomas Reed Powell describes as "the tourist trade of Nevada", or elsewhere, are unfortunate enough, but the effect on children of the attempted statutory two year prohibition of remarriage of one party to a divorce after a "decree absolute", makes one wonder whether that statute, may not have been an unrecognized suggestion of the devil masquerading as a suggestive moralist in a manner (so frequently and eloquently described by Puritan theologians in the early days, as well as in one of Hamlet's soliloquies) and operating, without their knowledge, on the minds of the Massachusetts legislators of 1881 who passed the statute (now section 24 of chap. 208 of the Gen. Laws.) As pointed out in the "Quarterly" for April, 1946 (Vol. XXXI, No. 1, pp. 33-34) the case of *Wright* v. *Wright*, 264 Mass. 453 illustrated the tragic situation of a wife who married legally in another state without knowledge of any legal obstacle and later found herself unmarried in Massachusetts. The later decision in *Vital* v. *Vital*, 319 Mass. 185 overruled *Wright* v. *Wright* in case one of the parties to a remarriage is innocent of any legal disability, but, while this decision is an improvement on the rule in *Wright* v. *Wright*, it leaves the question of the validity of the marriage in Massachusetts and the legitimacy, or illegitimacy, of children in the air for two years on the question of the state of mind of one of the parties.

"It does not seem that questions of marriage and legitimacy of children should be left by law in any such uncertain condition with all its possibility of tragedy.

"The law penalizes children because it illustrates what Dean Pound has called 'The limits of effective legal action.' It does not stop remarriages."

The recent legislature rejected the bill to repeal section 24, and also a reduction of the prohibition on remarriage to one year. By chapter 66 of this year, it attempted to check remarriages by pro-

viding that "the court, in issuing a copy of, or a certificate relating to, a decree of divorce entered by it, shall cause to be printed or written thereon the provisions of sections twenty-one and twenty-four," relating to the effect of a decree nisi and to the rights of divorced persons to remarry. This will be a warning which may prevent *some* premature remarriages but that is all. It does not help children in Massachusetts of legal remarriages in New Hampshire or elsewhere who are brought into Massachusetts. Nor does it help those in Massachusetts whose parents do not understand why a decree absolute is only half absolute.

Does not the "punitive" approach in our variable divorce laws result in punishing children in many ways?

Nobody knows what to do about it all. Sweden, we understand, has legitimatized all illegitimates. Such action is not likely to be followed in this country, but the picture from "The New Yorker" may well, (like the play in "Hamlet") "catch the conscience" and make us think about how to avoid imposing illegitimacy by a special statute.

As appears from the American Bar Association Journal for December, 1947 (p. 1207) and for March 1948 (pp. 195-199) the whole subject is being studied by the "National Conference on Family Life" which met in the White House in May. A committee of the American Bar Association was appointed for the limited purpose of assisting in the legal aspects of the problems, some of which were suggested in the Journal for March. Suggestions were requested by that committee.

Discussions by Mr. Parsons in the "Quarterly" for April 1947 and by Mr. Dunning in the "Quarterly" for October 1947, may well be read by those interested.

F.W.G.

An Important Decision of the American Bar Association in Opposition to a Proposed Amendment to the Federal Constitution

Most lawyers take the Federal Constitution for granted. They are comfortably unaware of proposals to change it although they become articulate in various ways about interpretations of some of its clauses by the Supreme Court, such as the "General Welfare" and the "Interstate Commerce" clauses. Especially, they take for granted the jurisdiction of the Supreme Court, and, from frequent conversations during the past year, we are convinced that most lawyers do not remember the words in the Constitution relating to the appellate jurisdiction of the court. As a representative of Massachusetts in the House of Delegates of the American Bar Association I think it important that the bench and bar should be informed of certain amendments which were proposed and discussed at the recent meeting of the House of Delegates in Seattle, and of the decision of the House, as such proposals may appear again and information as to them should be available for convenient reference.

Ever since 1788 the constitution has provided that the court "shall have appellate jurisdiction . . . with such exceptions and under such regulations as the Congress shall make". As reported in the American Bar Association Journal of January 1948, at a meeting of the Association of the Bar of the City of New York, a movement was started to request the American Bar Association to take the lead in initiating an amendment to eliminate the authority of the Congress which appears in the clause above quoted. This proposal came before the House in February and was referred to a committee. The committee by a majority vote, supported by a majority vote of another committee that had also considered the matter, reported favorably. A brief summary of the majority and minority reports appeared in the "Advance Program" of the Seattle meeting which was sent to all of the 41,000 members of the Association (pp. 68-73 and 93-97). As a member of the minority of the committee, believing that the question was too grave to be allowed to rest on the brief summary referred to and the necessarily limited debate on the floor, the undersigned mailed to each of the 220 odd members of the House the memorandum printed below, in advance of the meet-

ing. Thereafter the chairman of the committee supporting the proposal distributed to the House a counter memorandum. The Board of Governors supported the minority report in opposition to the proposal. In the debate in the House former Justice Roberts and another former member of the court were referred to as favoring the proposal. The House voted against the proposal. A motion was then made and adopted referring the subject back to the committee for a further report on the subject at the mid-winter meeting of the House next February. While I do not expect the House to change its position I think the Massachusetts bench and bar should be informed about the matter.

Two other proposed amendments suggested by the New York Association—one fixing the number of judges in active service as nine, and the other providing for retirement at the age of seventy-five, which had been favored by the House in February, were again discussed in slightly different form and were defeated. These also may come up again for discussion in February 1949. References to them will be found in the "Advance Program" already referred to (pp. 93-97).

F.W.G.

To the Members of the House of Delegates of the American Bar Association

This memorandum is submitted to those members of the House who are willing to read it in connection with one of the gravest questions which has ever come before the House which will be on the calendar at the Seattle meeting.

July 30, 1948

FRANK W. GRINNELL
State Delegate for Massachusetts
60 State Street, Boston, Mass.

In the pamphlet containing reports for consideration at the Seattle Meeting, which will be mailed to members soon, the committee on Jurisprudence and Law Reform, by a majority vote of 6 to 4 recommends the adoption of the following resolution.

The Recommendation of the Majority of the Committee

"RESOLVED: That the American Bar Association approves and recommends the adoption of an amendment to the Con-

stitution of the United States providing in substance that the Supreme Court shall have appellate jurisdiction in all cases arising under the Constitution of the United States, both as to law and fact, with such exceptions and under such regulations as it shall make.

"FURTHER RESOLVED: That the Committee on Jurisprudence and Law Reform be and it is hereby authorized to advocate on behalf of this Association the adoption of such an amendment to the Constitution of the United States by appropriate action on the part of the Congress and of the several States either as a separate amendment or as a part of an amendment which may include, in addition to provisions substantially as set forth above, other provisions pertaining to the Supreme Court of the United States which may be contained in any other proposed amendment or amendments to the Constitution which may be approved by the Association; and in the formulation and support of any such amendment or amendments, the said Committee is authorized to co-operate with the officers of the Association, the Committee on the Judiciary and any other agencies of the Association."

As one of the members of the committee opposing this resolution, I bespeak the most thoughtful attention of members of the House to this matter, before the meeting. Because of the necessarily limited time for debate on the floor of the House and in order that the matter may be considered from as many angles as possible, I submit the following memorandum. Part of this was circulated to all the members of the Committee.

Since then, it has been revised and extended in limited snatches of time. Whatever its defects, from lack of time or otherwise, as a discussion of so great a subject, it may provide a more colorful background for debate on the floor of the House than the necessarily condensed summary in the printed report in the advance program of the meeting sent to the 40,000 members of the Association.

Not having had time to submit it to the other members of the minority, I assume sole responsibility for its contents, especially for mistakes, if any. It presents the background as I see it, of the minority's opposition.

I wish to emphasize the statement of the minority in the Advance Program that this proposed amendment presents an entirely

separate matter from, and is not mixed up with, suggested amendments concerning the number of judges and the retirement age of judges.

As the real question involved in this discussion, is the future of the American doctrine of constitutional law, at the risk of boring such members of the House, if any, who may think it irrelevant, I have inserted a somewhat extended discussion of some aspects of that doctrine. In my judgment, a consideration of that constitutional doctrine has a material bearing on the proposal to tamper with the constitutional provision as to jurisdiction. If it seems too long I regret it, but when it is proposed that the House of Delegates should try to pull up one of the constitutional roots of 1788 and plant something else (not yet phrased) "in substance", whatever that means, I think members of the House should pause and consider what they are doing. This paper is an attempt to help in that process. If it does, so much the better. If it does not, no harm is done. At least, I have found it helpful myself.

As appears in the report, and also in the A.B.A. Journal for January, 1948 (p. 1-2) the proposal originated with a committee of the Bar Association of the City of New York and, after a favorable vote of that association, came before the House last February and was referred to our Committee.

Memorandum

In the first place, I submit that the House as representing members of the American bar when dealing with a sentence which has been in the constitution of the United States since 1788, should not stultify itself by approving any change whatever "in substance", thus admitting at the outset that the members of the House do not know how to phrase the proposed amendment. Four or five different suggested drafts have been called to the attention of the committee since the original proposal of the New York Association. In the opinion of the minority, all the drafts should be opposed. The minority appreciate, with the greatest respect, the sincere and public spirited judgment of their colleagues on the committee and of their brethren of the New York Association, but they are not only not convinced that the American Bar Association should lead a movement for the proposed amendment,

but they are convinced that the Association should oppose the amendment in any form.

The third article of the Constitution as ratified in 1788, now provides

"Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .

"Section 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party . . . . etc."

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have *original* jurisdiction. *In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.*"

The most, and only, extreme instance of the exercise by Congress of its authority in regard to the appellate jurisdiction, appears in ex parte McCardle, (7 Wallace 506) in 1869 during the reconstruction era in the midst of the unfortunate movement for "legislative supremacy" of Congress while the political impeachment proceeding against the President was pending. The political history of this case will be found in Warren's "Supreme Court in United States History" volume 3 pp. 186-210. The opinion was written by Chief Justice Chase and the judicial history of the case was told by Chief Justice Chase himself six months later in his opinion in Ex Parte Yerger (8 Wallace 85). In brief the petitioner in the McCardle case was arrested in Mississippi by military authority and held for trial before a military commission. An act of 1867 extended the original jurisdiction by habeas corpus of the district and circuit judges and under this act a writ was issued and after hearing the judge decided that the restraint was lawful and remanded the petitioner to custody. The petitioner appealed to the Supreme Court and the case was argued. Then, as stated by Chief Justice Chase (in the Yerger case)

"While the cause was thus held, and before the court had time to consider the decision proper to be made, the repealing Act under consideration was introduced into Congress. It was carried through both houses, sent to the President, returned with his objections, repassed by the constitutioned majority in each house, and became a law on the 27th of March, within eighteen days after the conclusion of the argument.

"The effect of the Act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.

"It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed; but it is not to be presumed that an Act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms."

The court then held, in the Yerger case, that the repealing act did not affect its appellate jurisdiction under any other act, thus limiting the McCardle opinion, as a matter of construction, to an exceptional and extreme situation which, while it illustrates the nature of the authority of Congress, is not otherwise important in view of the earlier history of the judiciary act of 1789, hereinafter described. The present law was stated by Chief Justice Stone in 1942, in *Lockerty* v. *Phillips* 319 U.S. 182 at p. 187, in connection with the establishment of the emergency court under the emergency price control act, as follows:

"All federal courts, *other than the Supreme Court*, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by article III, s. 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, *with such appellate review by this Court as Congress might prescribe. Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234, and cases cited; *McIntire* v. *Wood*, 7 Cranch 504, 506. The Congressional power to ordain and establish *inferior*

courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction *from them* in the exact degrees and character which to Congress may seem proper for the public good.' " (cases cited)

Such being the law (ever since 1789) the suggested amendments in any of the tentative drafts would extend *on paper* beyond the possibility of regulation, (but not beyond political attempts at regulation with unfortunate conflicts) the jurisdiction of the Supreme Court beyond what it is now, or what it has been in the past, rather than simply preserving its present regulated appellate jurisdiction, which we understand to be the purpose of the proposed amendments in the minds of its supporters.

It is true as stated in the majority report that, in *Lockerty* v. *Phillips*, Chief Justice Stone after stating that Congress, having created a special emergency court of appeals for price control cases *with a review of its decisions by the Supreme Court* said "At the same time it [Congress] has withdrawn that jurisdiction from every *other* federal *and state* court". Except in the McCardle case, Congress has never attempted to "withdraw" the "appellate jurisdiction" of the Supreme Court.

To What Extent Can Congress Withdraw "Appellate Jurisdiction"?

Congress has never attempted to repeal the appellate jurisdiction of the Supreme Court *in cases arising in the State courts under the Constitution of the United States* and I submit *with confidence* (but subject, of course, to correction) that congress could not do so. The 25th section of the Judiciary act of 1789 provided for it and the present statutes provide for it, but, if that had not been done, the jurisdiction would still seem to be there. "Appellate jurisdiction" of federal questions in cases from State Courts, seems clearly a part of the "jurisdiction derived immediately from the constitution and of which the legislative power cannot deprive it." (See *Stevenson* v. *Fain*, 195 U.S. 165, at p. 167) In *Kline* v. *Burke Construction Company*, 260 U.S. at p. 234 (cited by Stone, C.J.) the Court said that a circuit court "could not abdicate its authority or duty". That remark, of course, also applies to the constitutional "jurisdiction" of the Supreme Court and, if Congress had not provided procedure, the court, it seems, would have to provide for it

by rule. The state courts are bound to apply "the Supreme Law of the land" and it seems historically preposterous to suggest that Congress could prevent an appeal from state courts to the Supreme Court of the nation on federal questions. Reasonable regulation of procedure—yes, but denial of appellate jurisdiction, no. It would not make sense. It should not be forgotten that underlying the whole discussion is the provision in the sixth article that "this Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

A Retraction

At the meeting of members of the committee with members of the committee on the Judiciary in Washington on May 10th, I was asked whether if we were drawing a new constitution to-day as was done in 1787, I would support the proposal of the majority. I answered, first, that this was not 1787 and we were not drawing a new constitution, so that the question was purely theoretical, but second, if we were, I should probably support the majority view. Since then, after further consideration in the light of what I have written in this paper, I withdraw that statement and am of opinion that I would not support that view. I have more confidence in the long range constitutional judgment and foresight of our 18th century statesmen than I have in the constitutional views now advanced as "long range" views which I consider short sighted and disrupting.

Other Proposals About Jurisdiction

Those who wish to see the varied proposals made in times of peace during the past twenty-five years or so (and doubtless still proposed) in regard to the jurisdiction of the Court, will find some of them discussed in Part X, pp. 307-326 of Mr. Morris Ernst's book "The Ultimate Power"—a "catch phrase" title, noticeably peculiar in the light of the history of the last ten years since it was written in 1937. Various plans are discussed under the heading "How to Curb the Judges". Mr. Ernst's own proposal *at that* time was that Congress should be given the power to override a court decision by a two thirds vote as it can override a president's veto. Senator La Follette supported a similar proposal in 1923. Should

the American Bar Association stimulate *such a counter movement* by proposing that the court be given, on paper, more power than it has now? I think not. The fact that it was once suggested by John Marshall in a private letter at the time of the impeachment proceedings against Judge Chase, as an alternative to the political impeachment of judges (see Beveridge "Life of Marshall" III, 177, and Jackson 28) does not make it any wiser today. Such impeachments appear to have taken place in Ohio in 1807 and 1808 (Cooley Const. Lim. 6th Ed. 193, n.; 1 Chase's Statutes of Ohio, preface 38-40, 5 Pol. Sc. Quart. 251, 252)

"The American Doctrine of Constitutional Law" and its Future

This is the real subject involved in this question of "jurisdiction" of the court. The "origin and scope" of the doctrine were discussed in a famous address by a leading American scholar—James B. Thayer—before a professional body at the World's Fair in Chicago in 1893, which was subsequently printed in 7 Harvard Law Review 129, and again in his sketch of Chief Justice Marshall in 1901. Thayer was the great preacher of "judicial self-restraint" in the constitutional field before Mr. Justice Holmes appeared on the court in Washington. His writing was not marred by the use of catch phrases, thoroughly laced with prejudicial acid, which characterize much of the writing on the subject. Some other writers use extreme, dramatic and, therefore, popular, but not necessarily convincing, phrases, such as "judicial *usurpation*", "Government by judiciary" and "judicial supremacy". Such phrases should, perhaps, remind lawyers of the remarks of the late Justice Cardozo about Mr. Justice Holmes and the Remarks of Mr. Justice Holmes on the subject of "catch phrases" or controversial slogans.

In an appreciative tribute in celebration of the ninetieth birthday of Justice Holmes, in 1931 (44 Harv. L. Rev. 688-689) Justice Cardozo said: "The repetition of a catchword can hold analysis in fetters for fifty years or more," and he speaks of the effectiveness of Holmes in combating "the tyranny of tags and tickets" with a reference to page 230 of *"Collected Legal Papers,"* where Holmes said:

> "I am struck with the blind imitativeness of man, when I see how a doctrine, a discrimination, even a phrase, will run in a year or two over the whole English speaking world."

A partial list of writings, with or without "catch words" will be found in the footnote.*

Mr. Justice Jackson's Book—"The Struggle for Judicial Supremacy"

Of these books, I have found the most readable to be "The Struggle for Judicial Supremacy", written by Mr. Justice Jackson, while Solicitor General, and published in 1941. As he wrote freely, I shall write freely about what he wrote. I respectively submit that, before voting to support the proposed amendment, the members of the House, whatever their present views, should read this book *through*. They will, I think, then have a better understanding, not only of the controversy of 1937, but of the nature of some of the controversies as to all courts national and state which may be precipitated by the American Bar Association if we vote to support the proposed amendment to give to the court more of what will be called "judicial supremacy", whether the bar likes that phrase or not.

[Since this paper was prepared the following pertinent discussions have appeared in an article on "The Supreme Court and the Capacity to Govern" in the "Political Science Quarterly" for September 1948; "The Roosevelt Court—The Enigma of Seven Justices", The Macmillan Company 1948; an article entitled "A

Partial List of Books and Articles

* Boudin's "Government by Judiciary" (2 volumes 1932; Haines "The American Doctrine of Judicial Supremacy" 2nd Edition 1932; Willoughby, "Constitutional Law of the United States" second edition 1935; Pearson and Allen "The Nine Old Men"; Morris L. Ernst "The Ultimate Power" 1937; Mr. Justice Jackson's "The Struggle for Judicial Supremacy" (written largely while solicitor general and published in 1941); Hamilton and Braden's article on "The Special Competence of the Supreme Court" 50 Yale Law Journal 1319, June, 1941; President Roosevelt's introduction to Volume 6 of his State Papers relating to the court proposals of 1937, reprinted in *Collier's* magazine some years ago; Alsop and Kintner, "The Forty-Eight Days"; Charles Michelson "The Ghost Talks" chapters 12 and 16; McCune "The Nine Young Men"; Charles P. Curtis, Jr. "Lions Under the Throne", (a title, and to some extent, contents curiously reminiscent of a very unpopular 17th century idea); articles in the Yale Law Journal for September 1947 and February 1948, an article by Hon. Charles E. Clark in the West Virginia Law Quarterly for February 1948, various writings by Prof. Corwin and Prof. Thomas Reed Powell and an article by Mr. Palmer in the A.B.A. Journal for July 1948.

"The Business of the Supreme Court" by Frankfurter and Landis should also be read, also Warren on the history of the Judiciary Act of 1789, Har. Law Rev., Nov. 1923.

Court Supreme" by W. Wilson Sharp, former president of the Arkansas Bar Association, in the A. B. A. Journal for September 1948 and another article by Ben W. Palmer of Minnesota in the same issue.]

In the "Memoir of Theophilus Parsons" (the leader of ratification in Massachusetts in 1788 and our first *great* Chief Justice 1806-1813) written by his son appears the following passage (p. 199)

> "I believe there was nothing which my father more desired than that the people should cultivate in themselves a kind and respectful, but watchful jealousy of the judicial department; and should feel a deep and sincere, and yet a rational respect for it, founded upon a just understanding of the vast importance of its functions. And that the people might so feel, the very first and most essential cause must be, that the judicial department should deserve to be so regarded. He wished that the people should see and know, clearly and certainly, the utility of the judiciary to them; and that they should see and know as clearly the means by which their utility might be secured and preserved.
>
> "In this department he included, not the judges only, but all who were officers of the courts; and among them he placed all who practised at the bar."

In Fairman's "Mr. Justice Miller and the Supreme Court" (pp. 141-142) the following passage is quoted from an argument by Matt Carpenter, one of the counsel of the government in the McCardle case in its earlier stage:

> "This court has been told, not for the first time, that it is the great conservative department of the government; that if it does not keep constant vigil over the other departments, they will rush, as would the planets without the law of gravitation, into 'hopeless and headlong ruin.' There is nothing within the circle of human emotions, unless it be the pleasure with which a lover praises the real or imaginary charms of his mistress, at all to be compared with the delight experienced by a lawyer in glorifying a court. . . .Within proper bounds, this disposition is commendable; but the bar, in a free country, often have higher duties to perform; and this adulation of the judges may be carried to excess . . . It is our duty, when

occasions require, to admonish and warn, and that, too, whether courts will listen, or whether they will refrain."

It was in this spirit of mixed appreciation and criticism that Mr. Justice Jackson's book was written and it contains a valuable account of his view of historical developments in connection with the court, reflecting, as he says in his preface, an "*administration*" point of view on the Constitutional struggle of 1937. There are, however, other points of view and other historical facts which appear to have been overlooked or undervalued, not only by him, but by most other writers including James B. Thayer. In his preface, Mr. Justice Jackson said very fairly:

> "No doubt another day will find one of its tasks to be correction of mistakes that time will reveal in this structure in which we now take pride. Our innovations will then have become the established order, and only fanatics underestimate the power of an established order. As one who knows well the workmen and the work of this generation, I bespeak the right of the future to undo our work when it no longer serves acceptably. The precedents of this period should receive only the respect due to the deeds of men who with earnest heart and troubled mind have sought gropingly but honestly for what was best for their day."

Also, in his preface, he says "the seeds of a struggle for power were planted in the Constitution itself" by the creation of three departments. I respectfully challenge that statement. Those "seeds" were planted in human nature, as stated without the help of any lawyer, by the farmers of Berkshire County, Massachusetts, during the Revolution, as a reason for a constitution as a "fundamental basis" of legislation for the purpose of modifying the inevitable human struggles.

Attacks on the Court

In an address before the Massachusetts Bar Association in 1922 on "The Early History of the Supreme Court of the United States in Connection with Modern Attacks on the Judiciary" (Mass. Law Quart. Dec. 1922) Hon. Charles Warren pointed out that, ever since 1790, "whenever the court's opinion has differed from the views held by any important section or class in the community, a blast of invective and opprobrium has ensued," but not always

for the same reasons. As he also pointed out in "Congress, the Constitution and the Supreme Court", 1935 Edition, p. 193.

> "Present-day opponents of the Court center their dissatisfaction on those decisions of the Court which have held Acts of Congress invalid. It must be remembered, however, that for the first seventy-five years of the Court's existence, the attacks made upon it by its opponents were due to its decisions holding Acts of Congress valid; and it was because the Court upheld Congress in passing statutes, deemed by numbers of the people to violate the rights of individuals and of the States, that the Court was subjected for so many years to savage antagonism by considerable classes and sections of the country. For seventy-five years, it was the encroachments by Congress supported by the Court that were feared—and not at all encroachments by the court in derogation of Congressional power."

Judges and Law

Mr. Justice Jackson opened his first chapter with the following sentences

> " 'We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution'. So spoke Charles Evans Hughes, later to become the tenth Chief Justice of the United States.
>
> "The Constitution nowhere provides that it shall be what the judges say it is. How, then, did it come about that the statement not only could be made but could become current as the most understandable and comprehensive summary of American constitutional law?"

This opening quotation from Chief Justice Hughes, which has been frequently referred to by others, has the somewhat dramatic appearance of an unexpected legal statement but when one stops to think about it it contains nothing either new or extraordinary and its utterance originally, and as a quotation, emphasized in connection with Constitutional law, is really misleading because, as pointed out by John C. Gray in his well known book on "The Nature and Sources of Law" the remark might, if properly used, just as well have been applied not only to the Constitution but to all law applied by courts in judicial

decisions. To "say" what the common law is, or the statute law or the law of the Constitution or any other kind of law which is before them for decision and application, is the purpose for which courts exist and every lawyer and every judge knows it. The remark, therefore, as frequently quoted, is really nothing but "a man of straw" as a target to shoot at. If, as I believe, and as is demonstrated by the history of Massachusetts from the beginning, American Constitutions were intended to state "law" and to be applied directly *as law* by the courts, so far as general constitutional principles thus stated are capable of application, then the courts must "say" what they mean or they could not apply them. The remark, as quoted, therefore, I respectfully submit, has no significance whatever as applied to constitutional law, except in its unintentional tendency to cause misunderstanding.

Laissez-Faire

Throughout the book as in many other writings on the subject, the 19th century conception of freedom referred to as "Laissez-Faire" is also a target for attack as an obstacle raised by the courts to various kinds of needed legislation to deal with modern conditions. The book is full of illustrations of what are considered "from an administration point of view", examples of such judicial obstruction and some of the examples given are striking ones. One of the problems of the future, however, which already faces us, is that there is more than one kind of "laissez-faire". Certainly American constitutions did not contemplate the "legislative supremacy" of the English Parliament and, where and how far, the current tendency, or doctrine, of executive, legislative and administrative "laissez-faire" may lead us calls for some thinking.

Some Remarks of Judge Learned Hand

Near the end of an eloquent address on "The Contribution of an independent Judiciary to Civilization" on the 250th anniversary of the Supreme Judicial Court of Massachusetts in 1942, Judge Learned Hand, of the Second Federal Circuit Court of Appeals, said:

> "You may ask what then will be of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve

merely as counsels of moderation, I do not think that anyone can say.

"What will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon courts the nurture of that spirit, that spirit in the end will perish. What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens —real and not the factitious product of propaganda—which recognizes their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual. If you ask me how such a temper and such a faith are bred and fostered, I cannot answer. They are the last flowers of of civilization, delicate and easily overrun by the weeds of our sinful human nature; we may even now be witnessing their uprooting and disappearance until in the progress of the ages their seeds can once more find some friendly soil." (See "The Supreme Judicial Court of Massachusetts 1692-1942", published by the Massachusetts Bar Association, p. 66)

Does this passage suggest the complete disappearance of American constitutional law in the Federal System? (cf. "The Special Competence of the Supreme Court" Yale Law Journal, June 1941). Is this all that can be said about the future protection of the individual in America? These questions are puzzling lawyers. Judge Hand says "I cannot answer" the question "how such a temper and such a faith are bred and fostered."

There is no one way, but it has generally been supposed that under our constitutional system, whatever the occasional mistakes, the great opinions and decisions of our courts have done much to "nurture the spirit of moderation" during the past 156 years. I am among those who believe that the courts in general (and especially the appointed courts) during the past century and a half, have met their responsibilities and have been as, and often more, representative of the people than the executive and legislative branches. The courts (of course, within reasonable limits) were constitu-

tionally created to reflect and "nurture the spirit of moderation" and "justice" of the people as expressly described in the 15th article of the Virginia bill of rights of 1776 and the 18th article in Massachusetts in 1780.

Perhaps the future of constitutional law, like the future of the common law since the overruling of *Swift* v. *Tyson,* will depend, more than is generally realized, on the state Supreme Courts, as suggested by Mr. Walter Armstrong, former President of the American Bar Association, in the American Bar Association Journal for January, 1941. We believe that the people of Massachusetts and of America generally still expect and trust the courts to maintain *some* constitutional law, but, as stated by Thayer at the end of the article already mentioned.

> "Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."

If we are to approach the consideration of the Constitution of the United States in a "catch phrase" state of mind, it should not be forgotten that the more information which appears from various sources in regard to the happenings of 1937 the more evidence accumulates of a "struggle for executive supremacy" which seems to resemble the well known "struggle for legislative supremacy" which so bedeviled the government of the country and produced the situation in the McCardle case as an incident. Perhaps if we bear in mind all three of these great catch phrases about "supremacy" of all three departments of government we may grasp more fully and with a deeper understanding the great human conflicts in the thirst for power of which the 18th century makers of constitutions, from the members of the Philadelphia convention to the "dirt" farmers of Massachusetts, were profoundly conscious and which they endeavored to modify by introducing into the structure of government that balance of forces which contributes to the development of individual character.

I have already quoted the somewhat despairing remarks about American constitutional law from the address of Judge Learned Hand. In the same address he said

> "Nor need it surprise us that these stately admonitions refuse to subject themselves to analysis. They are the precipitates of "old Forgotten far off things and battles long ago", originally cast as universals to enlarge the scope of the victory, to

> give it authority, to reassure the very victors themselves that they have been champions in something more momentous than a passing struggle. Thrown large upon the screen of the future as eternal verities, they are emptied of the vital occasions which gave them birth, and become moral adjurations, the more imperious because inscrutable, but with only that content which each generation must pour into them anew in the light of its own experience."

With the exception of the last clause about "each generation", this passage does not describe the way in which we look at constitutional law in Massachusetts where much of it began. We still expect the courts to decide constitutional questions (of course, with due respect for the functions of the executive and legislative departments under the broad constitutional principles) because we still realize what James Otis said in his pamphlet on "The Rights of the British Colonies" in 1764:

> "Men cannot live apart or independent of each other . . . and yet they cannot live together without contests. These contests require some arbitrator to determine them. The necessity of a common, indifferent, and impartial judge, makes all men seek one."

We still realize that what the Berkshire farmers said, long before John Marshall, is as true today in one form or another as it was in 1776.

The Berkshire Farmers

In Smith's history of Pittsfield chapters 18-20 appear the petitions of the Berkshire farmers led by Thomas Allen, the country parson with a power of statement, who fired the first shot at the battle of Bennington. The petition of May, 1776 to the Massachusetts Legislature recited the reasons for refusing to allow the Massachusetts courts to sit in that county until a Constitution was formed as a basis of legislation. The farmers of western Massachusetts feared a legislature sitting on the seaboard as they had feared government from a distance in London and later feared government from a distance by Congress. They said

> "That from the purest and most disinterested principle and ardent love for their country, without selfish consideration, and in conformity with the advice of the wisest men in the

Colony, they ordered and assisted in suspending the executive courts in this county in August, 1774.

"That when they came more maturely to reflect on the nature of the present contest and the spirit and obstinacy of administration (p. 351)—

"When they further considered that the revolution in England afforded the nation but a very imperfect redress of grievances,—the nation, being transported with extravagant joy in getting rid of one tyrant, forgot to provide against another—and how every man by nature has the seeds of tyranny deeply implanted within him, so that nothing short of Omnipotence can eradicate them;

"That when they considered that now is the only time we have reason ever to expect for securing our liberties and the liberties of future posterity upon a permanent foundation that no length of time can undermine,—though they were filled with pain and anxiety at so much as seeming to oppose public councils, yet, with all these considerations in our view, love of virtue, freedom, and posterity prevailed upon us a second time to suspend the courts of justice in this county." . . . .

"That the first step to be taken by a people in such a state for the enjoyment or restoration of civil government among them is the formation of a fundamental constitution as the basis and ground-work of legislation"

. . . . "That, knowing the strong bias of human nature to tyranny and despotism, we have nothing else in view, but to provide for posterity against the wanton exercise of power, which cannot otherwise be done than by the formation of a fundamental constitution." (pp. 352, 353).

In 1778, "the county having again by decisive majority refused to admit the courts", they again called for a convention to form a Bill of Rights and a Constitution and suggested that if it

was not done they might apply to some other state for admission. The town of Concord and other towns having also demanded a convention, one was eventually held in 1779 and 1780 and the present Constitution of Massachusetts, with its Bill of Rights for "a government of laws and not of men" was adopted in 1780.

"The Rhetoric of Constitutional Law"

I am aware of the dangers involved in what, I think, my friend Prof. Thomas Reed Powell, has called somewhere "the rhetoric of constitutional law", and that there was a complacency about some of the 19th century rhetoric; but I, respectfully, suggest that there is just as much rhetoric on the subject today as there ever was in the 19th century, but of a very different character and quite as misleading. Perhaps, a reasonable amount of appreciative rhetoric may have been healthier for the American people than some of the corrosive intellectual acid frequently administered to them today.

One frequently hears criticism of judges on the ground that they are thought to consider "expediency". If mere "party" or "popular", "political expediency" is meant the criticism is sound, in spite of Mr. Dooley's famous remark about "election returns". But, as Thayer said in another essay on "The Insular Tariff Cases" (15 Har. Law Rev. 164), in dealing with some questions,

> "The judges are, indeed, not acting as statesmen, but their function necessarily requires that they take account of the purposes of statesmen and their duties; for their own question relates to what may be permissible to a statesman when he is required by the Constitution to act, and, in order that he may act, to interpret the Constitution for himself; it is never, in such cases, merely the dry question of what the judges themselves may think that the Constitution means." ("Legal Essays," 30, Note.)

The American Bar Association will do well not to indulge a too confident belief in its own sagacity and not to take itself so seriously as to assume, too much, its ability to win in a battle of political rhetoric. It might be better employed in reading "Alice in Wonderland" and "Through the Looking Glass" in order to get a sense of perspective.

There is one rhetorical opportunity, I think, for the courts to make themselves better understood by the American people.

An Unfortunate and Misleading Rhetorical Judicial Habit

One judicial habit which is characteristic, not only of the "Nine Old Men" and their predecessors, but also of the "Nine Young Men", which, in my opinion, misleads the public in regard to the real function and duty of a court and breeds misunderstanding and lack of confidence is the constant, almost parrot-like repetition of a phrase which does not describe human thinking. It appears most frequently, I think, in cases in which there is a division of opinion on the court. This was referred to in an editorial in the American Bar Association Journal for April 1923 (p. 232), in which various illustrations of the habitual language or "figure of speech" used by the court are given, of which the following is a sufficient example: "Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown *beyond a rational doubt.*" This statement was repeated substantially in the majority and also in the dissenting opinions in the minimum wage case, as it has been in most cases dealing with the validity of statutes, ever since Marshall's day, whether the court was divided or not. The editor of the "American Bar Association Journal" aptly described the practical result in five to four opinions as follows: "The decision is not that of a single judge. It is the decision of five judges moved by a conviction of duty amounting to a certainty and acting from no other motive than to enforce and uphold the constitution as the supreme law of the land." The editorial referred to called forth a considerable amount of correspondence from different parts of the country.

While the "presumption" in favor of the validity of a statute, which is in turn, based upon the presumption that the members of Congress thoughtfully and impartially, independently and with "competent knowledge" considered and acted upon the question, should be given all reasonable force, yet, since everybody knows, except, perhaps, the court speaking officially, that this presumption is often, to some extent, a "fiction" which exists, and must exist, for the purpose of defining the margin of responsibility, it should not be carried as a fiction, to such an extent as to displace common sense even if Marshall did use it. Other words of John Marshall used in *Fletcher* v. *Peck*—"A clear and strong conviction" is what the American people want from their judges, making all due al-

lowance for the natural and proper "presumption of validity of the act of a co-ordinate branch of the government."

The public and the bar can understand and respect a clear and strong reasoned conviction whether they like it or not. It must be more difficult for them to understand the "figure of speech", the use of which has become a judicial habit, when the majority of the court says the matter is clear "beyond a reasonable doubt" and then a minority of reasonable judges express a doubt in a dissenting opinion. May it not be truer, as well as clearer, and, therefore, more in the public interest in confidence in the court, for the court to discard the use of this "figure of speech" and adopt some more accurate description of its own processes such as that suggested by the editor of the "American Bar Journal?"

Why Be Frightened by the McCardle Case?

In the course of the discussion in our committee it was suggested that

> "It is not at all improbable in these days of extreme centralization of power that a dominating president might persuade a subservient congress to remove this jurisdiction and the supreme court would then be left with nothing but its original jurisdiction."

Bearing in mind the extraordinary conditions existing in 1868 when the very limited McCardle case was decided, let us examine that case and its weight as a precedent.

The constitution established the Supreme Court, and established the Constitution as the "*Supreme* law of the land." Except in case of a revolutionary upheaval which nothing *on paper* could control, we assume with confidence that we still have, and will have, enough constitutional law left to prevent congress from abolishing the Supreme Court. What is a court? It is a judicial tribunal with jurisdiction to decide litigated cases. Without such jurisdiction it is not a court. In the case of *Brien* v. *Commonwealth* (5 Met. 508) in 1843, the Supreme Judicial Court of Massachusetts decided that the transfer by statute of all the jurisdiction of the old Municipal Court of Boston to the Court of Common Pleas abolished the municipal court although the word "abolish" did not appear in the statute.

The "original" jurisdiction of the Supreme Court is so limited that it seems obvious that its principal, and intended and ex-

pressed, function was, and is, that of "appellate jurisdiction" of a court of last resort to decide cases involving "the supreme law of the land."

Now aside from uncontrollable political upheavals, is it within the range of practical probabilities (as suggested) that a majority of a court would be so politically subservient, as to abdicate and assist a congressional attempt to "abolish" the court by abolishing its primary expressed constitutional function by wholesale, or by cumulative retail, provisions merely on the authority of the McCardle case, which may have been one of the historic mistakes of the court. Of course, any form of government disintegration is conceivably possible, but should the American Bar Association today assume the practical probability of a permanently foolish congress and a court too feeble to say "no" to its own emasculation, on behalf of the American people?

How Would the Proposed Amendment Change the Present Law?

The proposal is that the "appellate jurisdiction" shall be "with such exceptions and subject to such regulations *as the court* may make". Under the certiorari practice provided by act of Congress in order to bring the load of work within the physical strength of the judges under modern changing conditions, the court now has authority to select the cases considered of sufficient public importance for its consideration, but the historic constitutional function of the court to decide constitutional questions under "the supreme law" still stands as the duty of the Court.

But suppose the proposed amendment were adopted, giving the court absolute constitutional control of "exceptions" to its jurisdiction and that we were to have a court made up mostly of men or women whose views about the judicial function and its history or the "special competence" of the court under the constitution, are represented by some of the books and articles herein mentioned. How long would the "American doctrine of Constitutional law" last then if the court had absolute control? Is not that doctrine, originally intended and confirmed by the people of the United States as the basis of growth for 160 years and as understood and believed in today, safer for the future in the hands of congress than of some possible (and perhaps probable) future court? Also in some states the bar is familiar with politically advisory statutes intended to influence a court, if possible, and described in judicial

opinions as legislation "in aid of the judicial department". Such statutes with varying political pressure behind them would still be within the field of probable congressional action particularly if the Congress should feel affronted and in a retaliatory mood from time to time because of the proposed constitutional change.

I suggest that the majority of the committee and our New York brethren are mistaken in thinking that the proposed change would strengthen and perpetuate "the American doctrine of Constitutional law."

I believe it would weaken it!

Conclusion

I have tried to communicate to the members of the House my conviction that bitter and political controversies threatening the future of American constitutional law would be precipitated throughout the country as to both federal and state courts if the American Bar Association should take the unfortunate step of proposing any amendment to the Constitution relating to the jurisdiction of the Supreme Court. Whether such an amendment passed or not, what such controversies might result in, no one can predict with certainty, but in my opinion for what it is worth, the results and the unexpected by-products of the results in the states, as well as in the nation, would be-devil American government as the assertion of congressional supremacy bedeviled it in the reconstruction era of the '60s.

About 1912 at the 25th anniversary of the Harvard Law Review, Chief Justice Hughes (then an associate justice of the Supreme Court) reminded us that "one of the greatest functions of the American Bar was to explain to the people their own institutions". It would seem to be the function of the American Bar Association (in its representative capacity) to continue to explain to the people their American doctrine of constitutional law under which they have grown great during 160 years, rather than to precipitate a nation-wide disrupting controversy based on the distrust of our constitutional structure on the part of *some* members of the legal profession.

We, of the minority of the committee, believe that, from the point of view of the public interest, the jurisdiction of the Supreme Court will be more safely left as it now stands under the Constitution and that, therefore, the proposed amendment should be defeated.

FRANK W. GRINNELL

A Little More Massachusetts History

In addition to the story of the Berkshire farmers, perhaps, a little more of the Massachusetts story should be told in answer to another statement at the beginning of Mr. Justice Jackson's book. On page 4 he said:

> "It is probable that many, and it is certain that some, members of the Constitutional Convention appreciated that [the] provisions [of the third and sixth articles] would spell out a power in the Supreme Court to pass on the constitutionality of federal legislation. But it was the least debated of any of the important implications of the instrument. Nor was this significant probability stressed, though it was mentioned, in the debates before the people and before ratifying state conventions. Most lawyers have believed that the implication is clear; others, that it is at the very best ambiguous. But certain it is that any explicit grant of this power was omitted and that it was left to lurk in an inference."

These words were published in 1941—seven years ago. On page 44 of the book, in referring to certain remarks of Mr. Hughes, before he became chief justice, appears the statement that "ten years play havoc with one's philosophy." Since he became a member of the court, possibly Mr. Justice Jackson's views of seven years ago, as to the meaning of the English language in the historic document may have changed somewhat. At all events the statement that the American doctrine of Constitutional law "was left to lurk in an inference", by the articles creating the Supreme Court and providing that the constitution "shall be the Supreme law of the land and the judges in every state shall be bound thereby" etc. calls for respectful challenge, at least from Massachusetts, as mistaken history and mistaken law. The need of the historical challenge is not affected, in my opinion, by his statement (on p. 5) that "the course of history has established that power in the Supreme Court".

In his lectures on "Foundations of American Constitutionalism", the late Prof. Andrew C. McLaughlin of the University of Chicago said "You cannot in discussion of American history lose sight of the seventeenth century". For the growth of constitutional ideas from the time of the Puritan Settlement see also Baldwin, "The New England Clergy and the American Revolution", and

"John Winthrop and the Constitutional Thinking of John Adams", 63 Mass. Historical Soc. Proceedings (1929-30) 91-119. Coming to the revolutionary period, on September 12, 1766, Hutchinson, the chief justice and later governor, wrote:

> "Our friends to liberty take advantage of a maxim they find in Lord Coke that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is ipso facto void." (Quincy's Reports, 527 and 441)

This idea was so strong that it even got into the early seal of the Massachusetts colony, adopted in July, 1775, which was "an English American holding a sword in the right hand and Magna Charta in the left hand, with the words 'Magna Charta' imprinted on it."

Thomas Paine, whose pamphlet, "Common Sense", first appeared early in 1776, of which thousands of copies were printed and distributed throughout the colonies, after urging a conference of representatives to frame a continental charter like Magna Charta, said:

> "Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth, placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far we approve of monarchy, that in America, THE LAW IS KING." (Ed. Feb. 1776 pp. 47, 48)

Ratification of the Federal Constitution

The Massachusetts Convention met on January 9, 1788. John Hancock was president but the vice-president, Chief Justice William Cushing presided at most of the sessions because Hancock had the gout. Cushing was not only one of the first appointees to the Supreme Court of the United States in 1789 and declined the Chief Justiceship in 1796, but was a member of the Court with Marshall in 1803 when the opinion in *Marbury* v. *Madison* was rendered. Cushing was then rather old and feeble but, of course, the court knew the Massachusetts story.

Hancock and the Federal Bill of Rights

The contest in Massachusetts was a turning point in the history of that document. Ratification was hopeless when the convention met and was still hopeless after three or four weeks of able debate

until the plan of suggested amendments to be submitted to the first Congress, which, in substance eventually became the Federal Bill of Rights, was suggested by John Hancock.

Massachusetts was the sixth state to ratify. Delaware, Pennsylvania, New Jersey, Georgia had ratified when the Massachusetts convention met on January 9, 1788 and Connecticut ratified on that day. There was, however, much uncertainty and uneasiness, not only as to the ultimate ratification by nine states, but, especially in Pennsylvania where it was still doubtful whether there might not be a counter-movement of some kind to upset the previous ratification. Virginia and New York had not yet acted. Washington and Madison, as shown by their correspondence, were very much concerned and believed that the ultimate result in Massachusetts, one of the larger States, would have great influence. In order to grasp the story, it should be realized that the convention in Massachusetts contained 364 members, a much larger membership than that in any other state. The debate lasted five weeks from January 9 to February 16. (See Warren "The Making of the Constitution" 819-20)

Samuel Adams

After Hancock had read his proposals Samuel Adams supported them saying

> "The only difficulty on gentlemen's minds is, whether it is best to accept this Constitution on conditional amendments, or to rely on amendments in future, as the Constitution provides. . .
>
> "This method, if we take it, will be the most likely to bring about the amendments, as the Conventions of New Hampshire, Rhode Island, New York, Maryland, Virginia and South Carolina, have not yet met. I apprehend, Sir, that these States will be influenced by the proposition which your Excellency has submitted, as the resolutions of Massachusetts have ever had their influence. If this should be the case, the necessary amendments would be introduced more early, and more safely. From these considerations, as your Excellency did not think it proper to make a motion, with submission, I move that the paper read by your Excellency be now taken under consideration by the Convention. . .

"Your Excellency's first proposition is, "that it be explicitly declared, that all powers not expressly delegated to Congress, are reserved to the several states, to be by them exercised." This appears to my mind to be a summary of a bill of rights, which gentlemen are anxious to obtain; it removes a doubt which many have entertained respecting this matter, and *gives assurance that if any law made by the Federal government shall be extended beyond the power granted by the proposed Constitution,* and inconsistent with the Constitution of this State, *it will be an error, and adjudged by the courts of law to be void.* It is consonant with the second article in the present Confederation, that each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States in Congress assembled. I have long considered the watchfulness of the people over the conduct of their rulers, the strongest guard against the encroachments of power; and I hope the people of this country will always be thus watchful."

Ratification was finally carried by a vote of 187 to 168—a majority of 19 votes. See Journal of the Convention; Harding "The Federal Constitution in Massachusetts"; Van Doren "The Great Rehearsal" pp. 197-204.

The First (?) State Court Application of the Federal Constitution

In 1799, the Supreme Court of Massachusetts rendered one of the first decisions applying directly as law, the provisions of the Constitution of the United States against state impairment of the obligation of contracts. This was in the case of *Derby* v. *Blake* arising out of the attempt of the Georgia legislature to revoke its grants following the discovery of the Yazoo frauds. The report of the case was discovered by Charles Warren in a Massachusetts newspaper of the time and was reprinted in 226 Mass. 618 in 1917. The question then decided was the same question which 10 years later was decided by the Supreme Court of the United States in *Fletcher* v. *Peck,* 6 Cranch 87 (see also Warren's "History of the American Bar" 270 Note and Pound's article on the 18th century conception of "obligation of contract" 27 Mass. Law Quarterly No. 4, October 1942, 19-20)

That is "history" in Massachusetts. There was no mere "lurking inference". The federal constitution meant what it said and said what it meant in clear language as to the existence of the judicial function and the basic reason for it was briefly and powerfully expressed by Thomas Allen and the Berkshire farmers without any lawyers (in the passages quoted) in 1776 before John Marshall appeared on the scene.

F.W.G.

"Twistory", Mystery and History and Four Books

The magazine section of the Christian Science Monitor of September 18, 1948 contains an article on "Twistory in the Making", by Mr. Ernest S. Pisko, a special correspondent of that paper. He begins by saying "Do not look up the word 'twistory' in your dictionary. You would not find it even in a 1948 edition. Nor would you find the cognates 'twistorian' and 'twistoric'. All three are brand-new words coined to fit a trend that has been developing over the past 30 years—the trend to twist history in accordance with government-sponsored ideologies. That does not mean that there were no twistoric manifestations prior to 1918."

Except for the rather intriguing word "twistory" there is nothing new about these remarks. They are directed primarily to the current Russian method of reporting or teaching which appear to follow the Hitler pattern, but the practice, in varying forms and degrees, has been common for centuries.

Writing to Jefferson in November 1815, John Adams said, "arbitrary power, wherever it has resided, has never failed to destroy all the records, memorials, and histories of former times, which it did not like, and to corrupt and interpolate such as it was cunning enough to preserve or to tolerate. We cannot, therefore, say with much confidence what knowledge or what virtues may have prevailed in some former ages in some quarters of the world."

"Twistorical" examples may even be found in books about law and courts.

Mystery

In the legal profession there is supposed to be more "mystery" than "twistory" and the reason would seem to be that, in the struggle for existence under modern conditions, many members of

the bar, unless they happen to have taste for reading as a form of relaxation, do not find the time, or realize the professional advisability, of keeping informed as to the backgrounds of legal developments. This is perfectly natural and these remarks are not intended in any sense as offensive criticism. Their purpose is merely to point out that the resulting ignorance or lapse of memory, creates a kind of mystery about familiar practices. As Lord Denman pointed out in 1851 as to some old and now discarded rules of evidence they were the result of the fact that many members of the profession assume that certain rules or practices "have been established on full deliberation by the wisdom of former ages . . . whereas in truth" they may be "the neglected growth of time and accident". The uninformed view as to the relation of jurisdiction, procedure and other professional matters to changing conditions has, sometimes, been unfortunate for clients, litigants and the public for long periods.

This professional view was particularly noticeable in the English bench and bar prior to the reform bill of 1832 and continuing in a lessening degree until the judicature acts of the '70's. It was true in Massachusetts in regard to the equity jurisdiction from 1692 to about 1877, and there is still a certain amount of lurking "mystery" because of earlier political prejudice and "twistory" in regard to equity prior to the '70's. The technicalities of criminal pleading, just in their origin to prevent injustice under an excessively severe penal code, but absurd in their survival, nevertheless survived until 1899. Recognition of the need of procedure for declaratory judgments, still unfamiliar to many of the profession in Massachusetts, had been developing elsewhere for many years before St. 1945, chap. 582 (30 M.L.Q. No. 3 Nov. 1945, 17).

In the same way economic, business, social and taxation changes, especially in this century, have forced study and experimentation in the field of estate planning, prompt decision of controversies outside the courts and what has been called "the equitable" development of criminal law in connection with the treatment of offenders and particularly juvenile offenders. To what extent the current experiments in these fields will prove to be sound only experience under them, or with them, will show. Meanwhile the profession is faced with them as existing facts. It is for this reason that three of the books, hereinafter noticed, are called to the

attention of the bench and bar, with this rather rambling introduction, as bearing on current and future problems in daily practice.

The comparative lack of time and taste for general reading and research of the bench and bar in general under the pressure of modern life, as compared with the professors, is, doubtless, the fact behind the statement quoted from the late justice Cardozo in the Kentucky State Bar Journal. He said, "Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the courts to the chairs of the universities."

Such leadership as the law faculties may provide is needed and should, of course, be welcomed, but the great balancing force of the *informed* judgment of experienced and thoughtful practitioners is needed to avoid excessively academic or idealistic slants in the future development of law and government. Lawyers throughout the country are hoping that the profession can regain a position resembling that of public leadership in the past. If that is to happen, and we believe it is happening gradually as a result of an awakening of the bar, is it not inevitable that the bar will have to *make* the time in future to do more reading and more of the hard thinking like that of the past in order to exercise and express informed judgment and advice? We leave that question to be answered by each individual member of the profession; but before answering it, perhaps, it would be well to read the remarks of Chief Justice Qua in this issue and some of the contents of the September number of the American Bar Association Journal, notably the article by Mr. Sharp, the recently retired president of the Arkansas bar.

In the "Quarterly" for April 1948 (p. 83) we quoted the statement of Prof. Andrew C. McLaughlin that . . . "The hope for successful popular government—and in very fact its justification—is based upon the willingness of people to think." Is that so or not?

F.W.G.

Book Notices

"An Estate Planner's Handbook"

By Mayo A. Shattuck, Little, Brown and Company

The bench and bar are familiar with Mr. Shattuck's helpful contributions to the understanding and practical application of the law of trusts the last of which was his revision of Loring's "A Trustee's Handbook" published in 1940 and in common use. Now he has produced this new and very practical book which ranges through modern family problems and the way to approach them from the point of view of a legal advisor, the use of life insurance, living trusts, wills and their preparation, the law of trusts, the practical problems in regard to powers of appointment and of the drafting of such powers, the Massachusetts rule of trust investments, various forms of family provisions in wills or trusts, the relation of estate planning to taxation and to conflict of laws, specific cautions to draftsmen and other practical aspects of the whole subject of the individual's property arrangements in their relation to his family and his business.

In addition to his practical experience and nationwide lecturing on the subject of trusts, one of his principal (but fortunately not his only) forms of relaxation and entertainment is to spend an evening in a comfortable chair before a fire reading about trusts. This fact which, while not stated in the book, has been stated in unprivileged conversation, gives added value to his practical judgment and advice and suggestions to the profession. He emphasizes the importance of the lawyer as the captain of an estate planning team while expressing also his appreciation of the advice of accountants and others, and he suggests to his brethren at the bar "that they are facing a distinct challenge and opportunity in the matters which are discussed in this handbook". He shows that estate planning "is not a mere tax dodging performance" and that while questions of taxation necessarily need the most careful attention in order that there may be something left of the estate planned under the modern complicated tax structure, the mere avoidance of taxes should not be the primary purpose of a plan.

His emphasis on the need of careful and skillful draftsmanship recalls the story told of a leading family advisor and trustee in Boston in the middle of the 19th century. A friend discovered him in the law library on a hot July day and asked him why he

was there. He replied, "I am studying law as I find that I have put perpetuities in many of the wills which I have drawn during the past twenty years."

Of course, that situation may not have resulted from his ignorance of the law as courts sometimes develop law beyond the expectations of the bar and sometimes modify or overrule cases on which the bar has relied. Also, in recent years particularly, tax legislation, and especially federal legislation, sometimes of an extraordinary character which nobody understands sufficiently to form a reliable opinion, may create new legal situations which call for the revision of wills or other previously drawn instruments as well as great care in the drafting of future instruments. In this connection Mr. Shattuck points out that "it cannot rightly be said that the lawyer who has drawn a 'regular' client's will or trust is forever discharged from all responsibility thereafter, regardless of the known or suspected effect of legal, economic or tax developments upon his handiwork . . . the lawyers need to re-examine their habits in this respect. They cannot expect to be regarded as alert and imaginative advisers if they are contented, year after year, to allow their clients to rely upon ambulatory instruments which, upon inspection, would reveal dangerously outmoded provisions."

The book reminds us of certain remarks of Prof. Casner in an article about class gifts in 51 Harvard Law Review (Dec. 1937) in which he said,

> "On the whole the courts have done a remarkable piece of work in the light of the mess that has been made of the job of draftsmanship . . . too many of the (instruments) requiring court interpretation are drafted by lawyers . . . the crying need is for draftsmen, educated to the seriousness and difficulties of the task they are employed to perform."
> (See also another article in 53 Har. Law Review 207).

Such remarks are not intended to suggest impossible standards for lawyers. In spite of all the post-prandial, or post-mortem, eloquence about "the unerring instinct for the jugular" or similar superlative and (unless taken with grains of salt) impossible phrases about this or that judge or lawyer, we all know that there never have been, and never will be, any lawyers of experience who have never made some kind of mistake. The value of a book like

Shattuck's is that it shows why it is harder today then ever before to become a good lawyer and a good judge, and helps us all to try to meet that challenge by suggesting the problems and the pitfalls. For this reason lawyers will find this book useful in practice.

F.W.G.

American Arbitration, its History, Functions and Achievements

By Francis Kellor, Harpers 1948

A brief account of the history of arbitration in Massachusetts was published in this magazine for January 1924 (p. 52) and May 1925 (p. 21). As there pointed out, the bar generally in Massachusetts has been and is still, pretty skeptical about the value of arbitration agreements and, so far as can be judged from conversations with lawyers, they are not familiar with the widespread extension in practice throughout the country of the use of arbitration to settle all kinds of disputes by persons who wish to have them settled promptly one way or another and, for that reason, prefer not to take their problems in court. This extended development has taken place largely since 1925 in this country. In England arbitration was more extensively used for many years prior to that time. Under conditions of the rapidly changing modern world, therefore, the appearance of this book with its evidence of the work of the American Arbitration Association, and of the fact that "lawyers are taking a leading position in the development of a practice of arbitration", that state and federal courts are cooperating in the development of this practice notably in connection with the motion picture industry and in many other fields, including accident claims, and that standards of behavior for arbitrators have been formulated in a "code", will probably open the eyes of members of the bench and bar to facts with which they are not familiar, which are withdrawing matters from judicial determination through the courts because of the delays involved in litigation.

F.W.G.

"Protecting our Children from Criminal Careers"

By John R. Ellingston, Prentice-Hall Inc. 1948

This book appeared almost immediately after the passage of the Massachusetts Statute (chap. 310 of 1948 "For the Prevention of Child Deliquency").

Back in the 18th century Sir John Fielding, the blind London magistrate and brother of Henry Fielding, the novelist and law reformer, became a pioneer in the field of this book. "It is certain," he said, when dealing with two small boys charged with stealing, "that sending such boys into prison is much more likely to corrupt than reform their morals."* Accordingly he organized two charities still active, to avoid such a result. More than one hundred years elapsed before the modern "juvenile" jurisdiction and juvenile courts (of which the Boston court was the, or one of the, first) became established in America early in this 20th century.

Since then the "facts of life" in the field of organized, and unorganized, crime in a machine age "stimulated" as Mr. Ellingston says, "by the prohibition experiment so fertile of evil," have created economic and social problems which have been constantly studied by both idealists and practical administrators. Following the publication of a little book "Youth in the Toils" by Harrison & Grant containing an account of conditions in New York, the American Law Institute began to study the problem in 1938 and in 1940 published a model youth correction authority act which attracted nation-wide attention as well as much criticism. California began the experiment by adopting the act in 1941. With some changes in the provisions of the draft act, to meet criticisms, statutes were adopted in Minnesota and Wisconsin in 1947 and in Massachusetts in 1948 and the Conference of Senior Circuit Judges has recommended to Congress a somewhat similar plan for the Federal Courts. The plan of the new statute, of course, is an experiment in a difficult field. This book will help those dealing with juveniles in practice, in understanding the reasons and purpose of the experiment.

F.W.G.

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* See "The Life and Work of Sir John Fielding", by R. Leslie-Melville (1934) XI. In his preface, the author expresses the opinion that "no one has played a greater part than he (Sir John) in moulding London to the form we now know."

"Handbook of Massachusetts Evidence (Second Edition)"

By W. Barton Leach, Little, Brown and Company

Probably most experienced trial lawyers and judges have the rules of evidence in their systems to such an extent that they seldom look at books on the subject; but many of less experienced persons should find this book useful in practice. As Prof. Leach says in his preface,

> "This book purports to provide in brief compass, a reasoned, analytical statement of the Massachusetts law of Evidence, with text of significant statutes and citation of leading cases in the State, and with detailed data on those points where the law is particularly involved. It does not, of course, purport to compete with *Norman and Houghton, Massachusetts Trial Evidence.*"

It is a thin book (of 109 pages including index) to be carried in a brief case for quick reference.

The publishers have sent out a correction of an inadvertent error on page 33. Lines 8 to 10 on that page should read, "a plea of guilty, even though withdrawn by leave of court, is admissible in a civil case against the defendant involving the same issues."

In his "Introduction" Prof. Leach pays his respects to the Massachusetts Court as follows:

> "Progress in the law of evidence between 1940 and 1947 has been considerable and beneficial: general clarification and development on a broad front, plus a dozen or so significant changes. For this the bar has to thank an alert Judicial Council and Legislature and a Supreme Judicial Court comprising members who have had an unusual variety of experience in this field, practical and theoretical, as judges, masters, prosecutors, advocates, teachers, and participants in the work of the American Law Institute on the *Model Code of Evidence.* The broad trial experience of the Court is of great importance. The function of the law of evidence is to provide the rule book by which, in the court room with its peculiar hazards of human fallibility, truth can be sifted from falsehood and right led to prevail over wrong. The framing of such a rule book

is an intensely practical business requiring the kind of balance between principle and pragmatism evidenced by the opinion of the present Chief Justice in *Leonard* v. *Taylor*, 315 Mass. 580, 35 N.E. 2d 705. This case and at least one other (*Bates* v. *Southgate*, 308 Mass. 170, 31 N.E. 2d 551) indicate that in formulating this rule book the Court does not bind itself to adhere to trends of previous decision which have been shown to work badly. *Stare decisis* is the rule, but it is not a prohibition."

In connection with paragraph B (p. 27) relating to evidence contradicting immaterial or inadmissible evidence, see Mr. Rosenthal's article in this number.

Pages 94-97 deal with "Judicial Notice". Readers of the book should, perhaps, be reminded that the present Massachusetts statute as to judicial notice (G.L. c. 233 s. 70) adopted as chapter 168 of 1926, is broader in its scope than that of any other jurisdiction. It was recommended by the Judicial Council in its first report for the reasons then stated (11 M.L.Q. No. 1, pp. 36-39) and was the first recommendation of the Council to be adopted. In addition to the information in that report it may be helpful to users of the present handbook to read the discussion of the use and interpretation of the statute, since 1926, in the "Quarterly" for May 1947 (No. 2 of Vol. 32, pp. 20-26).

On page 95, under this heading of "Judicial Notice" the statement appears that "It is noticed that Suffolk is a Massachusetts county; *Com.* v. *Desmond*, 103 Mass. 445, 447; but not that Boston is in Suffolk County; *Com.* v. *Wheeler*, 162 Mass. 428, 38 N.E. 1115." We seem to sense a polite and justified suggestion of absurdity in this contrast, but we respectfully question whether the last statement about Boston is correct today. The opinion in the Wheeler case (a criminal case in Worcester County) was in 1894. Five years later chapter 409 of 1899 was passed, following the report of a distinguished commission consisting of Judge Sheldon, Prof. Beale and Mr. Hurd, simplifying criminal pleading. The Wheeler opinion related more to criminal pleading than to judicial notice and seems to be governed, since 1899, by what is now section 20 of chapter 278 of the General Laws. Those who have occasion to deal with this topic may well read Thayer's

Chapter VII in his "Preliminary Treatise on Evidence", especially pages 278-280 and his suggestion (on p. 300) that

> "Practical convenience and good sense demand an increase rather than a lessening of the number of instances in which courts shorten trials by making *prima facie* assumptions, not likely on the one hand, to be successfully denied, and on the other hand, if they be denied, admitting readily of verification or disproof."

Prof. Leach's description (in his preface above quoted) of the law of evidence as "a rule book" is an interesting and accurate phrase describing this branch of adjective law. It seems to sum up, in three words, the point of the article in 21 American Judicature Society Journal for August 1940 (pp. 41-50) that the rules of evidence should be developed, not by a statutory code, and not in a lump, but, gradually, by rules of court when the need is clear, for reasons suggested in the note to Mr. Rosenthal's article on p. 00. It is always pertinent to remember the suggestion of Mr. Claude Mullins in his book "In Quest of Justice", that a monument should be erected to the forgotten litigants whose pockets have been searched to develop our law.

F.W.G.

New Jersey Rules on the Argument of Appeals and Appellate Practice

Readers of the Journal of the American Judicature Society or of the American Bar Association Journal during the past year will have noticed that one of the most radical changes in judicial organization and procedure that has occurred anywhere took place in New Jersey by constitutional amendment. Under the new plan the rules of procedure for all of the courts were formulated and promulgated by the new supreme court of which Hon. Arthur T. Vanderbilt, former president of the American Bar Association and a leading figure in the movement for judicial reform in New Jersey for many years, is the chief justice.

The preliminary draft of the rules in regard to *appellate* procedure was printed for the information of the bench and bar and

explained by the incoming chief justice at a meeting of about twelve hundred of them in March 1948. These rules were then revised in the light of suggestions, promulgated in June and went into effect at the same time that the new chief justice took his seat on September 15, 1948.

As the New Jersey plan is the latest development in procedure since the adoption of the federal rules, two or three provisions of these rules provide for interesting experiments. The rules contemplate, and the chief justice in his address specifically called the attention of the bar to the fact, that, "counsel will be well advised to keep constantly in mind in the preparation of their briefs that the briefs and as much of the appendix [the record] as may be necessary will be read by every member of the court in advance of the oral argument. Not only that, but an informal discussion of the questions raised by the briefs to be argued the following week will be the first order of business at the weekly conference of the court to be held each Friday. There will, of course, be no attempt to decide the issues at this conference in advance of the oral argument, but merely to ascertain in a preliminary way what each judge thinks is the vital question in the case so that we may be of assistance to counsel in their argument by directing their attention to the matters that are of special concern or interest to the members of the court, thereby making it possible for counsel, if he chooses, to use his time to the best advantage. I know from my own experience the effect of such knowledge on the oral argument. One evening last spring I met Judge Goodrich at a bar association meeting in New York. He told me that Judge Maris and he had been reading Mr. McCarter's brief and mine, that the question had very much aroused their interest, and that they were looking forward to hearing from us the following Monday. No lawyer can remain unresponsive to such knowledge."

In another part of his address he said, "It seems desirable, to avoid misunderstanding, to say a word about the nature of rules of court. Though our rules of court are judicial legislation, authorized by the Constitution, they are not a statute or a series of statutes. They are not a code and they are not to be considered as such. Terms are rarely defined in rules of court for they are written for lawyers . . . . They are a running commentary for the guidance of a learned profession as to the conduct of judicial business. The rule as to their relaxation to prevent surprise or

injustice (Rule 1:1-5) and the rule concerning canons of professional and judicial ethics (Rule 1:7-2) are the keys to any proper understanding of the rules as a whole. Seemingly simple, they represent in many cases the careful weighing of competing claims of right or of convenience.

"Rules of court in this State have never been and should not, as I have said before, become a source of litigation in themselves. I think it desirable to emphasize this statement, because the greatest danger to the Federal Rules, especially in those districts which are in code states, is the tendency to treat the Federal Rules in the spirit of a code. I am not going to repeat or adopt the language of old Chief Justice Hengham, but I should counsel restraint in litigating matters of procedure, and especially in citing Federal Rules decisions. As one of our favorite trial judges once said of the opinions of a certain court when one was cited to him: 'You can catch any kind of a fish in that pond.' After all, rules are but a means to an end and that end is the just administration of law in our courts."

Accordingly there is a paragraph in the rules as follows: "Relaxation of Rules. The rules of the court shall be considered as general rules for the government of the court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any cases where it shall be manifest to the court that a strict adherence to them will work surprise or injustice."

Another sentence in the rules is as follows:

"Original Jurisdiction. The [Supreme] court shall exercise such original jurisdiction as may be necessary to the complete determination of any cause on review."

The results of practical experience under these rules in New Jersey will be watched with interest.

F.W.G.